

**THE POLITICS OF EMERGENCIES: WAR, SECURITY AND THE
BOUNDARIES OF THE EXCEPTION IN MODERN
EMERGENCY POWERS**

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Abstract

The Politics of Emergencies: War, Security and the Boundaries of the Exception in Modern Emergency Powers

Ian Zuckerman

The chapters in this dissertation all explore a single set of questions, applying them to a variety of different historical and political contexts. The questions are: how are exceptional emergencies distinguished from quotidian political events? What is the vision of political “normalcy” in relation to which a state of exception can be declared, and in light of which the legitimate ends of exceptional, emergency powers defined? How do the background conceptions that define an “emergency” also shape the political dynamics of emergency powers? As I argued in chapter one, these questions push beyond the two predominant approaches in the contemporary literature: the first was the “naïve realist” view that emergencies have a self-evident, objective character, so that identifying an event as an “emergency” is a straightforward matter of accurately perceiving some factual state of affairs. The second was the decisionist or “deconstructive” view, which argues that emergencies can never be identified or verified factually, but rather are constituted independently of any “facts,” for example by a valid legal procedure for declaring a state of emergency, or by a sovereign decision on the exception. Neither of these two approaches, however, can provide us with an adequate account of the *politics* of emergencies, that is, the sense in which the definition of what counts as an emergency can be a dynamic arena of persuasion, justification and conflict, not only over the temporary consequences of emergency powers, but over the identity and content of normalcy as well. Distinguishing between normalcy and a state of emergency is not just a matter of perception (as

in the realist account) or decision (in the skeptical account); it is also, crucially, an act of interpretation and a process of political judgment, where the determination of an emergency is at the same time an evaluative claim about the identity of political normalcy. In other words, the definition of what counts as an emergency is simulations a way of defining what is the state of affairs that is being threatened, which also implies a judgment about the value of preserving a state of affairs that would justify exceptional measures. Thus, while the realist approach obscures this political realm of interpretation and judgment by reducing the definition of to a self-evident determination of facts, the skeptical approach dissolves the concrete political content and stakes of the definition of emergencies by abstracting and isolating the subjective decision on the exception from the broader ideological or normative context that determines whether such a decision will be considered authoritative, or legitimate.

Thus, the historical and contextual approach adopted in these chapters is motivated by two basic theoretical claims of the dissertation: first, that the what counts as an emergency is neither a self-evident fact nor the product of an unconstrained decision, but is constructed through a set of background assumptions and political judgments about the identity and value of normality. Secondly, the different ways that emergencies are defined and understood play a decisive role in shaping the political outcomes of emergency powers, so that for example the same institutional framework of emergency powers may produce very different political outcomes as the underlying conception of an emergency shifts.

The first section of this dissertation, comprising the first three chapters, explore these questions through an interrogation of theoretical literatures: the first through an interrogation of twentieth century and contemporary works on emergency powers, the second through modern republican thought and the third through theories of modern constitutionalism. The final three

chapters focus more narrowly on a case study: the transformation of legal and political theories of emergency powers in the United States. Chapter 4 analyzes 19th century theories of martial law; Chapter 5 looks at the theme of emergency and security during the New Deal period, and Chapter 6 investigates how the 20th Century concepts of War Powers and National Security impacted the idea of emergency powers.

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Introduction: What is an Emergency?

In 1973, a U.S. Senate special committee on the “termination of the national emergency” commissioned an official report on the statutes then in effect that conferred extraordinary, emergency power on the executive. The results still make for instructive reading. It was widely known that a large number of statutes delegated extraordinary powers to the president, but among the many senior legislators and executive officials consulted for the report, “no one knew” quite how many, and no comprehensive list existed anywhere of the emergency statutes that were *currently in force*. Here is the report’s opening summary of its findings:

Since March 9, 1933, the United States has been in a state of declared national emergency. In fact, there are now in effect four presidentially-proclaimed states of national emergency... [from 1933, 1950, 1970 and 1971]

These proclamations give force to 470 provisions of Federal law. These hundreds of statutes delegate to the President extraordinary powers, ordinarily exercised by the Congress, which affect the lives of American citizens in a host of all-encompassing manners. This vast range of powers, taken together, confer enough authority to rule the country without reference to normal Constitutional processes.

Under the powers delegated by these statutes, the President may: seize property; organize and control the means of production; seize commodities; assign military forces abroad; institute martial law; seize and control all transportation and communication; regulate the operation of private enterprise; restrict travel; and, in a plethora of particular ways, control the lives of all American citizens.

For the majority of the twentieth century – and, we can subsequently add, for nearly all far of the twenty-first so far – the US has been under a state of declared national emergency.¹ The authors of the report seem to assume that readers will find this to be a dramatic and startling about this fact, as well as them profoundly troubling. We do not necessarily learn anything new from this about the powers the government actually chose to exercise. Nevertheless, there still something startling, and troubling about this

If there is anything startling, and disturbing, about this fact, it's not so much because of what it tells us anything new about what the powers that were actually *exercised* in this period. Rather, it is disturbing because it seems to suggest a major disconnect between the special conditions in which we tend to think that emergency powers could be justifiable and legitimate, and the actual conditions in which emergency powers have been, and continue to be, available. Nevertheless, the fact that the emergency declarations that triggered such measures persisted for decades after the initial emergency may still strike us as problematic or even alarming. If so, it is worth trying to spell out the intuitions behind this reaction. What causes us to be queasy about the idea of permanent emergency government for the better part of a century?

¹ The outcome of the 1973 Senate committee was the National Emergency Act (1976), which rendered these open delegations of emergency powers dormant two years after its enactment, and attempted to mandate procedures that would make executive emergency declarations more transparent and temporary. From the Act's passage in 1976 until 2007, 43 national emergencies have been declared; about half of these remain in affect. Unfortunately, the transparency measures of the Act were significantly undercut by a 1977 law that granted the president authority to order members of the armed forces to active duty, without requiring a declaration of war, national emergency, or any other legislative authorization. 90 Stat. 517; 10 U.S.C. 12302. See the CRS Report for Congress: National Emergency Powers, 2007. As of 2011, the national emergency declaration by President Bush on September 11, 2001 is still in effect, renewed in 2010 by President Barak Obama. So is the controversially open-ended Authorization for the Use of Military Force, passed by Congress September 18, 2001. The AUMF was claimed by President Bush as a basis for the first wave of indefinite detentions and military tribunals in the War on Terror. The current Obama administration cites the same law as a basis for its powers to hold individuals suspected of terrorism indefinitely without trial – even after having been acquitted of any crime by civilian courts – conduct “targeted assassinations” of foreign nationals and even US citizens in foreign countries with which the US is not formally at war (such as Yemen, Somalia and Pakistan), and other extraordinary powers. See Scott Shane, “U.S. Approves Targeted Killing of American Cleric,” *New York Times*, April 6, 2010; Eli Lake, “The 9/14 Presidency,” *Reason Magazine*, April 6, 2010.

One possible explanation for the queasiness has to do with type of regime often associated with permanent emergency powers. Regimes that are seen by a majority or a significant minority of their population as unrepresentative and lacking in legitimacy may be forced to rely on harsher, more coercive measures in order to maintain in power. In such cases, from the perspective of a democratic, republican constitution, maintaining political control for the regime has become a permanent emergency, and nominally temporary emergency provisions effectively become permanent scaffolding over the constitution in order to prop it up. Permanent emergency powers in such a regime can no longer be characterized as what Clinton Rossiter called “constitutional dictatorship,” and have become, simply, dictatorship.² The United States post-1933, however, does not easily fit this case. While American history has undoubtedly been punctuated with moments of high-level state repression and violence, repression is more aptly characterized as temporary and focused on a particular segment of the population, rather than a permanent instrument of political rule and governance.³ However one gauges the legitimacy problems of the US state, it has not depended upon extra-judicial coercion and violence as an

² Rossiter, C. (1963). Constitutional dictatorship: crisis government in the modern democracies. New York,, Harcourt.

, Arato, A. (2000). "Goodbye to Dictatorships?" Social Research 68(1): 925-955.

³ Goldstein, R. J. (1978). Political repression in modern America from 1870 to the present. Cambridge, Mass. New York, Schenkman Pub. Co. ; Two Continents Pub. Group.

; Cole, D. (2005). Enemy aliens : double standards and constitutional freedoms in the war on terrorism. New York, New Press : Distributed by W.W. Norton.

Another peculiarity of the US is that some of the most severe non-temporary forms of repressive violence – such as, for example, in labor relations in the late-nineteenth and early twentieth centuries, or in the Jim Crow South – were not at the hands of the federal government but occurred at the state level and, particularly, within civil society. See, for instance, Rana, A. (2010). The two faces of American freedom. Cambridge, Mass., Harvard University Press.

. Authors such as Loic Wacquant have argued that we should interpret the dramatic growth in the American penal system since the 1980s as a permanent instrument of governing a poor, marginalized sector of the population through state coercion and violence. Wacquant’s interpretation does not directly affect the issue here, however, since the penal system is an instrument of the ordinary legal order rather than emergency powers. See, Wacquant, L. (2002). "From Slavery to Mass Incarceration: Rethinking the 'race question' in the US." New Left Review 41: 41-60.

ordinary means of domestic governance. Outbreaks of outright illegality and repression, as serious as they have been, have not been the norm.⁴

If near-permanent emergency powers have not resulted in outright dictatorship, they nevertheless raise very troubling questions in a constitutional democracy. The most basic reason sounds trite, though it isn't: emergency powers are supposed to be reserved for emergencies. An emergency in the ordinary sense of the term is defined as "a state of things unexpectedly arising, and urgently demanding immediate action."⁵ There are three main elements here, all of which are relevant. The first pertains to knowledge; an emergency is unexpected, unforeseen, something that cannot be known in advance. Secondly, there is a reference to time: an emergency arises suddenly, turns up without warning. And the response must be equally swift, if not immediate. Third, an emergency is urgent, serious, a dangerous threat that demands action. These three aspects of the ordinary definition of emergency are all fundamental in juridico-political discussions of emergency powers as well. In that context, "emergency" refers to a political event that, due to its unexpectedness, suddenness and dangerousness, demands a swifter and more powerful response than the ordinary procedures and limitations of constitutional government is capable. All three of these conditions seem to be necessary for there to be an emergency in the sense here. Obviously, quotidian politics is full of unexpected, transitory events that do *not* present a threat to something vital to the political order, and are not emergencies in the political sense. Moreover, ordinary, everyday politics is full of debates about potential dangers and threats on the horizon – think for instance, of ongoing arguments over future consequences of the environment, the national debt, nuclear proliferation, to name a few examples. None of these,

⁴ Ackerman, B. A. (2010). The decline and fall of the American republic. Cambridge, Mass., Belknap Press of Harvard University Press.

⁵ This definition comes from *The Oxford English Dictionary*. Other definitions that I have checked, include the same three dimensions stressed in this one.

however would be an *emergency* in this sense precisely because we can argue over the future consequences of long-term, foreseeable trends in the present.

The quotation with which I began, then, seems to confront us with a disturbing gap between the basic meaning of our terminology and our practices. The Senate Report describes of emergency powers that are permanent, ordinary, indistinguishable from the norms of ordinary governance? How should the trend toward permanent emergency powers and the normalization of emergency powers be interpreted? How should it be diagnosed, and what should be our response?

Two Diagnoses: Emergency Powers vs. the Exception

The observation of permanent emergencies has resonated through a large and diverse scholarly literature. On the one hand, it has drawn the attention of numerous constitutional scholars and legal theorists. Thus, David Dyzenhaus has perceptively suggested that contemporary emergency powers confronts us less with the stark outlines and boundaries of a legal black hole than with “a multitude of black (or grey) holes within the ordinary law of the land...[that are] likely to become a permanent feature of legal order and to spread.”⁶ Bruce Ackerman observes that “emergency measures have a habit of continuing well beyond their time of necessity,” and warns that permissive judicial review leads to “the normalization of emergency conditions – the creation of legal precedents that authorize oppressive measures without any end.”⁷ Oren Gross has given one of the most detailed and comprehensive accounts of how “[e]mergency regimes tend to perpetuate themselves, regardless of the intentions of those who originally invoked

⁶Dyzenhaus, D. (2006). *The constitution of law : legality in a time of emergency*. Cambridge ; New York, Cambridge University Press., 61.

⁷ Ackerman, B. (2004). "The Emergency Constitution." *Yale Law Journal* **113**(8),1030, 1043.

them.”⁸ On the other hand, a number of prominent post-Marxist or continental political philosophers seem to have made a similar observation. Giorgio Agamben has recently pronounced that “the state of exception has by now become the rule.”⁹ Mark Neocleous pushes this observation to characterize capitalist modernity as a whole: “the pattern is almost always the same...what appear initially to be *extraordinary* powers developed under the auspices of something labeled ‘emergency’ very quickly and easily infiltrate the *ordinary* legal system, become regularised as a technique of government and normalised as a technology of power.”¹⁰ Michael Hardt and Antonio Negri speak of “a permanent state of emergency and exception” underlying the structure of Empire, and in a later work declared that “*the state of exception has become permanent and general*; the exception has become the rule, pervading both foreign relations and the homeland.”¹¹

While there is a broad convergence in this observation of a trend toward normalization and permanence, scholars have diverged sharply in how the trend should be diagnosed. At the broadest possible level, it is possible to between two basic approaches among contemporary theorists of exceptional or emergency powers. The first approach is *juridical* and *institutional* in its orientation, and focuses on what I will refer to as *emergency powers*. The second is *genealogical* and *deconstructive* in its orientation, and focuses on what I will refer to as the *state of exception*. By *the exception*, I mean, following Carl Schmitt’s famous definition, a fundamental break or suspension of the legal order, issuing from a sovereign decision.¹² By *emergency powers* I mean an exceptional framework of rules, norms, and institutions that

⁸Gross, O. (2006). "What 'Emergency' Regime?" *Constellations* 13(1): 74-88., 75.

⁹Agamben, G. (2005). *State of exception*. Chicago, University of Chicago Press.,9.

¹⁰Neocleous, M. (2008). *Critique of security*. Montreal, McGill-Queen's University Press., 67.

¹¹, Hardt, M. and A. Negri (2000). *Empire*. Cambridge, Mass., Harvard University Press., Hardt, M. and A. Negri (2004). *Multitude : war and democracy in the Age of Empire*. New York, Penguin Press., 7.

¹² See Schmitt, C. and ebrary Inc. (2005). *Political theology four chapters on the concept of sovereignty*. Chicago, University of Chicago Press.,5-6, 12-3.

suspends part of the ordinary legal system, and regulates whatever “emergency powers” are authorized. Thus, whereas in the state of exception the unconstrained sovereign decision is prior to and unlimited by any legal constraints, emergency powers establish special powers that are limited by legal procedures and institutional means. Theories of emergency powers generally presuppose that even exceptional powers are normatively limited, and distinct from absolute, unconstrained sovereignty. Theorists of the state of exception, in contrast, generally argue that the possibility of an absolute sovereign decision is necessarily presupposed by any actually existing legal system, and at the same time necessarily transcends any attempt to normatively codify or limit it. Whereas theories of emergency powers attempt to show that, even in an extreme crisis, absolute sovereignty can be restrained by institutions and laws, theories of the exception claim to demonstrate that, in a genuine crisis, emergency powers are irrelevant.

Of course, like all such broad categories, these necessarily oversimplify a great deal of methodological and normative variation within each approach, as well as some scholars who draw selectively from both approaches, but they nevertheless help clarify and organize the current state of the literature. The *juridical* and *institutional* theorists all share as a premise the goal of limited emergency powers, and reject the necessity of sovereign decisionism. The major debates within the emergency powers school involve *which* institutional frameworks of emergency powers are the most effective ways to meet legitimate needs during an exceptional emergency, while preventing sovereign decisionism and the temptations of political officeholders to abuse emergency powers for their own ends. Theorists of the state of exception, on the other hand, generally draw on Schmitt’s argument for the purposes of unmasking and critiquing the authoritarian premise of absolute sovereignty lurking behind the façade of liberal constitutionalism. In contrast to the juridical and institutional focus of emergency powers

theorists, the state of exception literature tends to adopt some variation of a genealogical analysis of the discourses of governance through which sovereign power operates, and/or a deconstructive approach aimed at destabilizing the metaphysical binary oppositions on which liberal theories of the rule of law depend.

The Black Box of Emergencies

Despite the important methodological and normative differences between the juridical, institutional literature and the genealogical, deconstructive literature, they both share a common oversight. In different ways, both approaches isolate emergency powers and the exception from the complex political question of *what* counts as an exception or emergency in the first place. Institutions of emergency powers as well as the sovereign decision on the exception are both understood as political *responses* to some external state of affairs. This external state of affairs, in both literatures, tends to be characterized briefly and vaguely with phrases such as “extreme peril,” “dangerous emergency” and the like, usually without further analysis.¹³ Neither explicitly interrogates how such identifications are made, with what criteria and through what process of judgment.

I argue that this tendency to take for granted the identity of the external state of affairs, and to isolate it from the juridical and conceptual framework of exceptionalism, has limited and curtailed the potential contributions of both schools. In fact, what constitutes a “dangerous emergency” that breaks with the normal state of things in any particular polity is neither self-evident nor historically uniform. The exceptional or emergency character of an event is

¹³ Phrases taken at random from, respectively, Schmitt, *Political Theology* and, Fatovic, C. (2009). Outside the law : emergency and executive power. Baltimore, Johns Hopkins University Press.

necessarily an *interpretation* not only of the character of the external event, but also of the identity and norms of the political community itself. Whether domestic unrest, for example, appears as an urgent emergency or as part of the fabric of ordinary political life is determined by the underlying assumptions and prevailing categories that define a state of normalcy, as well as what constitutes a threat to that normalcy, and the identity of what must be preserved against such threats. The character of an emergency, we might say, does not reside independently in events themselves but in the broader political understandings through which events as *political* events are interpreted, debated, acted upon. The approach undertaken here will be to broaden the inquiry from an exclusive focus on the institutional ensemble of emergency powers or the theoretical structure of the state of exception to include within these questions the underlying problem of *what* counts as an emergency in the first place. This perspective, I argue, can help advance beyond some of the theoretical deadlocks and limitations that have hampered the literature in both fields, and frame more succinctly the *politics* of emergencies as an essential component of theorizing both emergency powers and the state of exception.

The chapters in this dissertation all explore a single set of questions, applying them to a variety of different historical and political contexts. The questions are: how are exceptional emergencies distinguished from quotidian political events? What is the vision of political “normalcy” in relation to which a state of exception can be declared, and in light of which the legitimate ends of exceptional, emergency powers defined? How do the background conceptions that define an “emergency” also shape the political dynamics of emergency powers? As I argued in chapter one, these questions push beyond the two predominant approaches in the contemporary literature: the first was the “naïve realist” view that emergencies have a self-evident, objective

character, so that identifying an event as an “emergency” is a straightforward matter of accurately perceiving some factual state of affairs. The second was the decisionist or “deconstructive” view, which argues that emergencies can never be identified or verified factually, but rather are constituted independently of any “facts,” for example by a valid legal procedure for declaring a state of emergency, or by a sovereign decision on the exception. Neither of these two approaches, however, can provide us with an adequate account of the *politics* of emergencies, that is, the sense in which the definition of what counts as an emergency can be a dynamic arena of persuasion, justification and conflict, not only over the temporary consequences of emergency powers, but over the identity and content of normalcy as well. Distinguishing between normalcy and a state of emergency is not just a matter of perception (as in the realist account) or decision (in the skeptical account); it is also, crucially, an act of interpretation and a process of political judgment, where the determination of an emergency is at the same time an evaluative claim about the identity of political normalcy. In other words, the definition of what counts as an emergency is simulations a way of defining what is the state of affairs that is being threatened, which also implies a judgment about the value of preserving a state of affairs that would justify exceptional measures. Thus, while the realist approach obscures this political realm of interpretation and judgment by reducing the definition of to a self-evident determination of facts, the skeptical approach dissolves the concrete political content and stakes of the definition of emergencies by abstracting and isolating the subjective decision on the exception from the broader ideological or normative context that determines whether such a decision will be considered authoritative, or legitimate.

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neither a self-evident fact nor the product of an unconstrained decision, but is constructed through a set of background assumptions and political judgments about the identity and value of normality. Secondly, the different ways that emergencies are defined and understood play a decisive role in shaping the political outcomes of emergency powers, so that for example the same institutional framework of emergency powers may produce very different political outcomes as the underlying conception of an emergency shifts.

The first section of this dissertation, comprising the first three chapters, explore these questions through an interrogation of theoretical literatures: the first through an interrogation of twentieth century and contemporary works on emergency powers, the second through modern republican thought and the third through theories of modern constitutionalism. The final three chapters focus more narrowly on a case study: the transformation of legal and political theories of emergency powers in the United States. Chapter 4 analyzes 19th century theories of martial law; Chapter 5 looks at the theme of emergency and security during the New Deal period, and Chapter 6 investigates how the 20th Century concepts of War Powers and National Security impacted the idea of emergency powers.

An Outline of the Dissertation

Chapter 1 seeks to substantiate the basic thesis of this dissertation through a close analysis of two of the most important recent theorists of emergency powers: the mid-twentieth century works of Carl Schmitt, and the more recent contributions of Bruce Ackerman. I argue that, in spite of the apparently contradictory positions taken in Schmitt's work, they nevertheless fit within a unified theoretical orientation that Schmitt did not always make explicit. This theoretical framework can be clarified and reconstructed by paying attention to the background idea of

emergency and specifically what entity was under threat in Schmitt's writings. That entity, I argue, was the modern, sovereign state as it had existed in the European interstate order since the mid-17th century, and which Schmitt perceived to be in radical crisis. Clarifying this basic orientation point of Schmitt's theory is crucial, I argue, not only for interpreting the background context of his writing more importantly for understanding how it is relevant for the present. Secondly, I pose the same question to Bruce Ackerman's influential recent work on emergency powers, and interrogate Ackerman's definition of an emergency rooted in the concept of security. While Ackerman's institutional proposal itself is sophisticated and salutary, I argue, the background conception of what constitutes an emergency is more problematic, conceptually inconsistent and politically at cross purposes with his own stated goals. Both Schmitt and Ackerman, in different ways, illustrate the value and importance of a reflexive, rather than realist, understanding of what defines an emergency.

Chapter 2 picks up from the argument in favor of breaking with a naïve positivist conception of emergencies in order to see how they are constituted in relation to the forms of political organization and normative commitments that give them their contours. At the most basic level, the contours of emergency politics are shaped by the most fundamental form of political organization in modernity: the state. In the most obvious sense, since the physical existence of the state is a precondition for any other political good valued by that polity, Rousseau's dictum that "it is always the general will that the state shall not perish" could be considered the fundamental maxim of emergency powers. But the apparently self-evident *sine qua non* status of the state belies a host of difficult questions that emerge from this premise. The second chapter three examples of tensions within different strands of the modern state give rise to different forms of emergency politics. These tensions are, first, between collective liberty and

reason of state; second, between popular sovereignty and representation, and third, between the state as both a guarantor and a threat to individual security. I explore these themes, each of which is *internal* to the structure of modern state, as it appears in modern political thought and show how each of these three tensions becomes an arena for debates over emergency politics. The first tension takes place predominantly in the modern republican tradition and gives rise to an extended argument over how to interpret the institution of the dictatorship. The second occurs on the field of political representation and provides the backdrop for debates surrounding plebiscitarianism and emergency politics. The third is an understanding native to liberalism, and structures an ongoing liberal ambivalence toward the state and individual security. Each of these three arenas of emergencies, I argue, continues to shape debates over emergency powers in the present. Locating the terms of these debates within tensions that are internal to the modern state suggests that these debates are in some sense non-eliminable so long as we continue to organize political life within the form of the modern state. If so, rather than eliminating the tension itself or find some abstractly optimal balance point, theories of emergencies should aim at making the tension as self-reflexive and transparent as possible.

If Chapter two focuses on the state in order to analyze the imbricated relations of political power and normative commitments that give substance to different conceptions of emergencies, **Chapter three** turns to constitutionalism in order to analyze different juridical *forms* of emergency powers that accompanied the rise of modern constitutionalism. The emergency of modern constitutionalism and the normative emphasis on general, abstract, universally binding law ironically brought the problem of contingency in politics into sight in a new way. Defenders of the rule of general and standing laws over the discretion of political rulers were simultaneously forced to grapple the boundaries of normativity outside of which singular

instances could not be subsumed under general norms. Specifically, constitutionalism confronted its boundaries in three main dimensions: *epistemic* (politics may be non-foreseeable, unanticipated), *temporal* (politics may be too sudden for the tempo of procedural decision-making), and *spatial* (politics outside the sphere of the applicability of the law). The institutional and juridical forms developed to cope with these boundaries to the ordinary rule of law without undermining it include the institutional and juridical forms of emergency powers and war powers. Through an analysis of the theories of dictatorship in Machiavelli and Rousseau and of prerogative in Locke and Blackstone, I argue that the distinction between legally authorized vs. extra-legal emergency powers is not in itself a key determinant of whether emergency powers have a more or less authoritarian character. Rather, alongside this distinction we should include the question of the location of judgment about the legitimacy of the emergency – is judgment located exclusively within institutions of the state and legal procedures, or does it incorporate the role of public judgment and contestation? How vital are the counter powers in civil society and the public sphere, and how likely are they to meaningfully scrutinize and contest emergency declarations? If we add the state/civil society axis alongside the legal/extralegal one, this significantly transforms the debate over extra-legalism.

Chapter 4 turns to the United States and locates the dominant paradigm of emergency powers from the end of the 18th century until the civil war within the framework of constitutionalist emergency powers described in chapter 2. Against prevailing interpretations in the scholarly literature, I argue that the dominant paradigm of emergency powers in this period was not some version of the Lockean prerogative but martial law. Focusing on martial law allows us to see how this theory of emergency powers fit within the theoretical architecture of the constitutional state, grounded on the categorical opposition between the external state of nature and war (in

which no commonly binding positive law or neutral judge obtained) and the internal state of effective legal sovereignty, which made constitutional rights legal citizenship possible. Martial law referred strictly to instances where effective internal sovereignty was ruptured, where courts could not open their doors and function. Only in those instances could the legally constituted persona of citizenship be stripped and executive or military officials detain individuals without charge or try them for crimes against non-statutory laws of nature. After giving a description of the theoretical and juridical contours of martial law, the chapter traces the increasing tension between the martial law paradigm and the process of democratic inclusion and expansion over the course of the 19th century. This process, culminating in the radical reconstruction after the Civil War, the martial law paradigm was forced to confront a distinction that was essentially anomalous or penumbral to it: the distinction between “commissarial” martial law instituted by the constituted power to restore the status quo ante and “sovereign” or revolutionary martial law commissioned by the constituent power to create a new order. This distinction, brought on by the disruptive demands for racial and economic democratization, rendered martial law’s theoretical foundation in the distinction between law and politics untenable. Faced with an essentially democratic revolutionary regime of martial law in the occupied south, courts lost any ability to present themselves as purely juridical, non-political interpreters of the constitutionality of emergency powers. Ironically, the case that stands in the midst of the process, *ex parte* Milligan, has been stripped of its context and has become the apex of the legalist, court centered civil libertarian theory of emergency powers.

Chapter 5 examines the reorganization of a juridical theory of emergencies based on *security* rather than effective internal sovereignty, and a juridical framework of emergency powers based on *police powers* rather than martial law. The new paradigm, incubated in the

period of progressive legal realism and put in place during the New Deal, was crafted to incorporate new regulatory and administrative powers during the New Deal. The dire economic insecurity brought about by the Great Depression constituted an emergency that justified suspending constitutionally entrenched property rights and limitations on federal power. The constitutional framework for this new security-based justification of emergency powers was not war and sovereignty based paradigm of martial law but the regulatory and discretionary framework of police powers. This shift implied replacing the categorical *per se* criteria of effective internal sovereignty with the “realist” criteria of judicial balancing tests, legislative delegation and interpretive accommodation.

Chapter 6 analyzes the process through which the new theory of emergency powers that developed in relation to domestic regulatory powers shifted, beginning in the midst of WWII, from the economic back to the external, military realm. It explores how this innovation consolidated in the discourse of national security, decoupling the identification of normalcy with a state of peace and restructuring the international field as more or less permanently punctuated with crisis and ongoing emergency powers. The theme running throughout was the one established in Chapter 2 of the bedrock distinction between the paradigms of crime and war undergirding the modern constitutional state. The dissertation concludes with a reflection on how the discourse of security applied to the field of emergency powers has given rise to legal and institutional categories that threaten to rupture this axial distinction between crime and war, belligerence and punishment, and the inner and outer spaces of the juridical order.

Chapter I. Emergency Powers, the Exception and the “Self” of Self-Preservation

Beyond Realism and Skepticism

The current literature, then, is split between the schools of emergency powers and the exception.

Another way of characterizing the contemporary literature is through the distinction between

realist and skeptical approaches to the distinction between normal and emergency states. What I am calling the realist approach equates an emergency with some factual state of affairs that could be recognized by any independent observer. As John Ferejohn and Pasquale Pasquino describe it:

Some (let's call them "realists") claim that this ontological [between norm and exception] difference is objective and evident, that everybody can recognize its existence or supervenience; as a result, a neutral, involuntary mechanism can be established in order to detect its appearing or disappearing as a state of the world. An analogy would be as when the level of a river goes over a given threshold and an automatic mechanism systematically triggers an alarm or some other action or performance.¹⁴

On this account, being correct or mistaken about an emergency is simply a matter of accurate perception, as Nomi Lazar puts it, analogous to identifying whether a fruit is really an orange or a lime.¹⁵ In contrast, the skeptical approach brackets this reference to a factual state of affairs. As Ferejohn and Pasquino describe

Some other thinkers (let's call them "skeptics," or we may call them Schmittians) claim that there is no absolute evidence of the existence of an exceptional situation, that people will inevitably disagree about its existence, and thus we need to attribute to some agency (organ or institution) the epistemic authority to declare the exception. The skeptics believe in the epistemic dimension and are reserved concerning the ontological one.¹⁶

¹⁴ Pasquino, J. F. a. P. (2004). "The Law of the Exception: A Typology of Emergency Powers." *International Journal of Constitutional Law* 2(2)., 226.

¹⁵ Lazar, N. C. (2009). *States of emergency in liberal democracies*. Cambridge ; New York, Cambridge University Press., ch. 2.

¹⁶ Ferejohn and Pasquino, "Law of the Exception," 226.

The perspective I will advocate in what follows is an alternative to this contrast between skepticism and realism as well. Neither of these approaches are adequate to grasp the way in which the definition of what counts as an emergency can be a dynamic arena of persuasion, justification and conflict, not only over the temporary consequences of emergency powers, but over the identity and content of normalcy as well. Distinguishing between normalcy and a state of emergency is not just a matter of perception (as in the realist account) or decision (in the skeptical account); it is also, crucially, an act of interpretation and a process of political judgment, where the determination of an emergency is at the same time an evaluative claim about the identity of political normalcy. In other words, the definition of what counts as an emergency is simulations a way of defining what is the state of affairs that is being threatened, which also implies a judgment about the value of preserving a state of affairs that would justify exceptional measures. Thus, while the realist approach obscures this political realm of interpretation and judgment by reducing the definition of to a self-evident determination of facts, the skeptical approach dissolves the concrete political content and stakes of the definition of emergencies by abstracting and isolating the subjective decision on the exception from the broader ideological or normative context that determines whether such a decision will be considered authoritative, or legitimate.

Carl Schmitt: the Anatomy of the Exception

I want to turn to a reading of Carl Schmitt as a means of clarifying the concepts of emergency powers and the exception, as well as the distinction between realism and skepticism. Schmitt, has

been a major – if not *the* major – intellectual source for both of the contemporary schools I’ve outlined and I will argue that Schmitt’s work provides a basis for distinguishing between emergency powers and the state of exception within a single theoretical framework. Presenting this framework will require some theoretical reconstruction, since the overall coherence of this theory has been obscured to some extent by Schmitt’s tendency to shift abruptly from work to work in political focus and orientation. For this reason, the importance of both emergency powers and the state of exception in Schmitt’s work has often been overlooked, particularly by recent scholars of the state of exception who are eager to claim Schmitt as entirely their own.¹⁷ A number of theorists of emergency powers, on the other hand, have been attentive to Schmitt’s two conceptions, but have overemphasized the contradiction between them and underemphasized their relationship as distinct parts of a larger theory.¹⁸ It will be helpful, therefore, in bridging the distance between these two very different approaches and theoretical vocabularies to see how emergency powers and the exception function alongside one another in the theory of Carl Schmitt.

The alternative interpretation of Schmitt I will present here follows directly from the basic questions I have been emphasizing so far in this chapter: how are emergencies distinguished from ordinary conditions? What characterizes the underlying conception of political normalcy with reference to which judgments can be made about the degree, type and urgency of the threat? How do these background conceptions that define what is an emergency

¹⁷ E.g. Agamben. Of course numerous commentators have made this observation. In addition to McCormick, J. P. (1997). *Carl Schmitt's critique of liberalism : against politics as technology*. Cambridge ; New York, Cambridge University Press., who I will discuss in detail, see in particular Andrew Arato, “Goodbye to Dictatorship?” for an illuminating discussion of Schmitt’s *Dictatorship*. Other works that have commented from different perspectives on this issue include Balakrishnan, G. and C. Schmitt (2000). *The enemy : an intellectual portrait of Carl Schmitt*. London ; New York, Verso., Kennedy, E. and ebrary Inc. (2004). *Constitutional failure Carl Schmitt in Weimar*. Durham, Duke University Press.

¹⁸ John McCormick, *Carl Schmitt's Critique of Liberalism*.

shape or inform the nature of emergency powers or the state of exception? I want show that this line of inquiry brings into sharper focus some important aspects of Schmitt's theory that have been overlooked or distorted by other interpretations. One of these is that provides a vantage point that helps to clarify an underlying theoretical consistency in Schmitt's various accounts of emergency powers and the exception that is often overlooked. A second advantage comes from focusing closely on the relationship between the positive account of emergency or exceptional powers and the concrete identification of *what* was the essential political form definitive of the "status quo" that must be preserved from existential threat. Clarifying this relationship and the essential role it plays in Schmitt's theory is important not only for a more nuanced historical interpretation of Schmitt's text; it also helps us to judge how Schmitt's theory can be used to illuminate our own time, as well as how reapplying his theory without regard for different contexts can lead to misconstruing or distorting the present.

Schmitt has been invoked variously as an example of both the positivist and the skeptical approaches discussed previously. On the one hand, liberal scholars have responded to Schmitt's challenge that liberalism is fatally naïve about emergencies and the political exception. Taking Schmitt's challenge at face value, they have highlighted a variety of different institutional means by which liberalism can, *pace* Schmitt, effectively anticipate and respond to emergencies, understood in terms of the naïve positivist approach described above. On the other hand, some radical critics of liberalism have embraced a "skeptical" interpretation of Schmitt's theory of the sovereign decision, transforming the state of exception into a theoretical or logical postulate that calls into question a priori the integrity of the rule of law. After highlighting the limitations of both of these, I argue that Schmitt held neither a skeptic nor a positivist approach to emergencies, but rather had a sophisticated account of the political relations that shape any possible

identification of the norm and the exception in a particular political order. Thus, reconstructing the continuity and consistency in Schmitt's writings on emergency powers and the state of exception will require a different approach than either the skeptical or the positivist one.

Schmitt's continuous preoccupation with the nature and identity of the underlying emergency of his own time is informed by Schmitt's theoretical account of the political conditions for identifying such a threat.

What in Schmitt's view faced an existential threat was the state, as it had existed in Europe since the creation of the Westphalian order. In Schmitt's view, the modern state, standing above and apart from society internally, and possessing exclusive *jus belli* externally, faced a series of emergency threats to its existence, and his Weimar works explored a number of different potential means for overcoming these threats. Understanding Schmitt's idea of the modern state is crucial because it clarifies the nature of the emergencies that preoccupied Schmitt, and the identity of what emergency powers are charged with preserving or restoring. Obviously, this conception of the state was hardly uncontroversial or universally shared among Schmitt's contemporaries, and Schmitt's attempts to discredit its competitors comprise a major polemical axis of his work. It is this preoccupation with the modern state that has receded or even disappeared in many influential subsequent interpretations of Schmitt's theories of emergency powers.¹⁹ Abstracting concepts from Schmitt's texts such as sovereignty, or the state of exception from the concrete political content they had in his work has the advantage of greatly expanding interpretive possibilities, as well as freeing the interpreter to apply the concepts to an impressive range of historical and contemporary phenomena, philosophical as well as literary works, etc. The downside, however, is the danger that the wildly disparate content becomes

¹⁹ To cite two prominent examples: Mouffe, C. (1995). "Carl Schmitt and the Paradox of Liberal Democracy." *The Canadian Journal of Law and Jurisprudence* 10(1). and Giorgio Agamben's *Homo Sacer* and *State of the Exception*, discussed in more detail below

interchangeable, and concepts themselves become indeterminate and cease to illuminate anything external to itself.

Schmitt's decisionism: beyond skepticism and positivism

In their distinction between “realist” and “skeptical” theories discussed above, Pasquino and Ferejohn affirm a widespread interpretation of Schmitt as the paradigmatic “skeptic” – indeed, they even use the categories “skeptic” and “Schmittian” interchangeably.²⁰ For them, this amounts to the idea that there will never be any ultimate “fact of the matter” of whether the exception exists or not, and therefore it is defined not by an external state of affairs but rather by “some agency (organ or institution)” that possesses “the epistemic authority to declare the exception.”²¹ Thus, in Republican Rome, the exception existed when the Senate initiated a proposal for the consuls to appoint a dictator. Likewise, for Schmitt’s *Political Theology* the exception exists when the sovereign has made a decision to that effect – no reference to external political or sociological conditions necessary. I will argue in a moment that this is a very incomplete and distorted account of what Schmitt is saying, but first let us turn to a prominent contemporary theorist of the exception that embraces such an interpretation, Giorgio Agamben.

Agamben adopts a kind of radicalization of Ferejohn and Pasquino’s skeptical or epistemological interpretation of Schmitt’s exception. The distinction between norm and exception refers only to the decision of the sovereign, without any reference to an externally existing state of affairs. Agamben is highly critical of any attempt to define or give content to the

²⁰ Ferejohn and Pasquino, 226.

²¹ Ibid.

idea of necessity that could identify the existence of a state of exception. The problem, for Agamben, is that

writers continue more or less unconsciously to think of [necessity] as an objective situation. This naïve conception – which presupposes a pure factuality that the conception itself has called into question – is easily critiqued by those jurists who show that, far from occurring as an objective given, necessity clearly entails a subjective judgment, and that obviously the only circumstances that are necessary and objective are those that are declared to be so.²²

There are strong epistemological grounds for a skeptical critique of any reference to extra-juridical “facts,” the most sophisticated example being Hans Kelsen’s neo-Kantian conception of legal positivism. From a Kelsonian perspective, any possible act that could be attributed to the state must come from an agent who is legally authorized to perform that act – such as the Roman Senate initiating a proposal for the consuls to appoint a dictator. From such a perspective of normative validity, the state of exception can be objectively described in juridical terms without any reference whatsoever to extra-juridical “facts.” The problem is that Agamben rejects this legal positivist approach even more vehemently than the idea of objective necessity. Agamben’s starting point, following Schmitt, is that the state of exception cannot be circumscribed or contained by any system of norms.²³ Hence, the “skeptical” solution described by Ferejohn and Pasquino of looking at which agent is authorized to declare an exception is unavailable to him. Strikingly, Ferejohn and Pasquino don’t seem to have noticed that this “epistemological” solution doesn’t work for Schmitt’s famous dictum in *Political Theology* about the sovereign decision on the exception, for which it is invariably cited. The broader argument of *Political*

²² *ibid.*, 29-30.

²³ See Agamben, *State of Exception* at, for instance, 1, 8, 23.

Theology is designed to work against it. The argument in chapter one of that work, which builds upon the opening definition of sovereignty and also helps explain it, is in fact crafted with precisely Han's Kelsen's sophisticated account of legal skepticism as its target. Kelsen's approach held, essentially, that in order to avoid lapsing into dogmatism or mysticism, jurisprudence must *necessarily* adopt a radically skeptical attitude regarding relations of causality or "factual contingencies." Jurisprudence must rigorously limit itself to determinations of *normative validity* and refrain from any causal determinations by extra-juridical forces. The reason for this is that since all legal norms have the structure of an *ought* rather than an *is*. It makes no sense to inquire whether a legal norm is "true or false"; a juridical norm can only be "valid or invalid," and validity can derive only from another, higher norm. Thus, for Kelsen jurisprudence must exclude all judgments of causality, and must therefore necessarily regard the legal order as a self-enclosed unity, deriving norms from higher legal norms, and bracketing the extra-juridical domain of causality and "facts" altogether.²⁴

The purpose of Schmitt's definition of sovereignty is that it would rupture the hierarchy of norms that the skeptic necessarily relies upon in order to distinguish norm from exception. If Schmitt's definition is accepted, then even if a *Rechtsstaat* constitution does not assign any single agent sovereign authority for an unconstrained decision, this does not mean that such an agent doesn't exist politically (although he would not be identifiable through means of legal validity alone). Rather, it means that the identity of the sovereign becomes clear in an exceptional moment; the sovereign will be whichever political agent has the authority and legitimacy (whether or not they have legal validity) to make collectively binding decisions regarding the

²⁴Kelsen, H. (2002). *Pure theory of law*. Union, N.J., Lawbook Exchange., 6-8; 19-20; Kelsen, H. (1999). *General theory of law and state*. Union, N.J., Lawbook Exchange., 14.

self-preservation of the political community. If the political community exists at during a crisis, such a decisive entity *must* be in existence.

Despite the prominent role Agamben assigns to Schmitt's theory of sovereignty, Agamben removes the idea of the anomic sovereign decision on the exception from its context in an argument that sovereignty and the terms by which an "exception" is identified cannot be established formally and abstractly, but must be analyzed as concrete political sociological determination. Agamben's position is the exact opposite of this: for him, neither the juridical order nor concrete judgments about the nature of 'necessity' or the exceptional situation can tell us anything important about the state of exception: "Not only does necessity ultimately come down to a decision, but that on which it decides is, in truth, *something undecidable in fact and law*."²⁵ Schmitt attempted to link the concept of the exception indissolubly together with a reference to concrete political agency. Agamben's theoretical framework, which does not recognize agency in general,²⁶ not only decouples the exception from any determinate political reference, it actually transforms the concept itself into a sort of trans-historical actor on its own. The exception, as it increasingly becomes a norm of governance, "also lets its own nature as the constitutive paradigm of the juridical order come to light."²⁷ The nature that comes to light is the same that was originally disclosed in the Roman legal category *homo sacer* and reached fruition in the concentration camps, namely, the law's relation to bare life, a theme in which Agamben discovers the "historico-political destiny of the West."²⁸ It may seem surprising for an interpreter of Foucault and Derrida to end up with this kind of metaphysics and the resurrection of speculative philosophy of history, but it is a logical enough outcome of Agamben's

²⁵ *State of Exception*, 30. My italics

²⁶ see, Passavant, P. A. (2007). "The Contradictory State of Giorgio Agamben." *Political Theory* 35(2): 147-174.

²⁷ Agamben, *State of Exception*, 6.

²⁸ Agamben, *Homo Sacer*, 17.

methodology. Having decoupled his major theoretical concepts from any determinate political content, the concepts have effectively become their own content, and have become identical to the truths they illuminate. If Schmitt's concept of the exception can still be useful for interpreting the present, it would have to maintain, rather than abandon, its focus on an external political world. In order to explore this further, I will now turn to a very different attempt to reflect on how Schmitt's work can illuminate the problem of emergency powers in the present, namely, John McCormick's insightful distinction between Schmitt's theories of emergency powers and the exception.

Republican Emergency Powers, anti-Republican Exception

McCormick, both in his *Carl Schmitt's Critique of Liberalism*, and in subsequent articles, has developed an interpretation of Schmitt that is organized around a contrast between Schmitt's theory of commissarial dictatorship from his 1921 *Dictatorship* with the better-known account of the state of exception in *Political Theology*, published in 1922. As McCormick demonstrates, although these works are separated by only a year, they contain radically different accounts of the scope and nature of exceptional powers. McCormick argues that Schmitt's early position in *Dictatorship* clearly articulates and distinguishes dictatorship in its "proper sense" as a temporary, emergency authority that is commissioned to suspend ordinary separation of powers and take "concrete measures" for the sake of restoring the *status quo ante* of the constitutional order. This model of limited, constitutional emergency powers Schmitt calls "commissarial dictatorship," which he contrasts to a second type that emerges from the French Revolution:

“sovereign” or revolutionary dictatorship. Sovereign dictatorship is (despite the misleading name) an extraordinary power that is commissioned by the revolutionary *constituent* power rather than the constituted power, and is exercised for the sake of instating a *new* constitutional order rather than returning to the old constitutional *status quo ante*. Thus, *Dictatorship* presents us with a fundamental contrast between legal, temporally limited, restorative *emergency powers* in the form of commissarial dictatorship, and extra-legal, future oriented, technically indefinite and unlimited revolutionary dictatorship in a *state of exception*.

Although Schmitt does not explicitly present the distinction in normative terms, McCormick is at least somewhat justified in interpreting Schmitt’s *Dictatorship* as a clear endorsement of the model of commissarial dictatorship, positively depicting its non-sovereign, temporally and functionally limited character, in sharp contrast to the unbounded and unlimited instrumentalism of sovereign dictatorship that is vividly illustrated for Schmitt in the Bolshevik dictatorship of the proletariat. McCormick argues, persuasively, that Schmitt’s glowing depiction of limited emergency powers reflects a surprisingly pro-republican stance, as does his keenness to dispel the liberal hostility to dictatorship, and defend it as a crucial institutional means of strengthening and bolstering republican constitutionalism during crises.

In McCormick’s interpretation *Political Theology*, from its very first sentence declaring that “Sovereign is he who decides on the exception,” is a wholesale rejection and repudiation of the position staked out in *Dictatorship*. After all, if the exception cannot be codified or anticipated in advance, the ambition of constitutional emergency powers of subjecting even extraordinary crisis government to the limited status of a “commission” is futile. Schemes to require legal authorization, maintain the separation of powers, and impose time and scope limitations on exceptional powers are at best superfluous, to be swept aside when a real crisis

hits. Thus, from this perspective *Political Theology* directly targets and overcomes the three basic pillars of Schmitt's early case for emergency powers: first, that exceptional power can be anticipated and restrained in advance by legal rules; second, that the authority to use exceptional measures can remain a *commissioned* authority distinct from sovereignty itself; and third that the distinction can be maintained between the sovereign power to change the constitution, and limited emergency measures authorized only to restore the status quo ante. In the later theory, each of these limits is breached by fusing together dictatorship with unconstrained sovereignty. In the passage from *Dictatorship* to *Political Theology* we can see, McCormick remarks, the process where "a particularly brilliant Weimar conservative became in fact a Weimar fascist."²⁹

For McCormick, at the core of Schmitt's break with constitutionalism in favor of fascism is a kind of radicalized Weberianism that amplified the tension between legal and charismatic legitimacy into an irreconcilable antagonism. On this account, Schmitt associated legal legitimacy as such – including the rule-governed instrumentality of commissarial dictatorship – with disenchantment, empty instrumentality, and the loss of meaning or value in politics. This was why Schmitt regarded the explosive charisma unleashed in the sovereign decision on the exception with such feverish optimism: "In the exception the power of real life breaks through the crust of a mechanism that has become torpid by repetition."³⁰ He regarded the charismatic basis of plebiscitarian leadership as the sole remaining source of legitimacy available to post-1917 Europe that could still infuse political life with non-instrumental meaning and value.³¹ Thus, McCormick argues, from *Political Theology* onward Schmitt continued to look to the state of exception as both a weapon against legal rationalism and a source for reigniting charismatic

²⁹ McCormick, *Carl Schmitt's Critique of Liberalism*, 148. In another version of this argument, "Dilemmas of Dictatorship," in Dyzenhaus, D. (1998). *Law as politics : Carl Schmitt's critique of liberalism*. Durham, NC, Duke University Press. (He makes the same claim at 236-7 and again on 242).

³⁰ Schmitt, *Political Theology*, 15.

³¹ McCormick, *Carl Schmitt's Critique of Liberalism*, 148.

legitimacy. Works such as *The Guardian of the Constitution* and *Legality and Legitimacy* applied this model specifically to Weimar institutions as a means of undermining the republic from within, deliberately contrasting an enfeebled parliamentary legality to the superior legitimacy of extraordinary powers exercised by the plebiscitary president as an embodiment of the popular will.³² McCormick's conclusion is that the contrasts between *Dictatorship* with the subsequent theory not only illuminates the dangers of plebiscitarianism and unbounded decisionism; it also demonstrates in commissarial dictatorship a model of emergency powers that would not undermine liberalism but on the contrary could serve as an important means for strengthening. Thus for McCormick liberals can learn from Schmitt's early theory of emergency powers as a *liberal defense* against the later Schmitt's false diagnosis of liberalism's fatal weakness in its inability to acknowledge the exceptional dimension of political life.³³

Other interpreters of Schmitt would contest McCormick's distinction between the 1921 liberal-republican friendly Schmitt, and the 1922 and after fascist Schmitt. Some scholars such as Antonio Negri and Andreas Kalyvas have proposed a democratic reading of Carl Schmitt that encompasses both moments. They do so by giving, to different degrees, priority to Carl Schmitt's theory of constitution making, his identification of the constituent power as the unbounded, sovereign decision reflected in a constitution. In post-French Revolutionary

³² Schmitt's 1924 article "Die Diktatur des Reichspräsident nach Art. 48 der Weimarer Verfassung" (appended to subsequent editions of *Dictatorship*) can be interpreted as a transition point between the first conception and the third. Somewhat ambiguously, Schmitt insists that the powers granted by Art. 48 are merely delegated or commissioned. At the same time, Schmitt distances himself from the earlier commissarial model, arguing that the presidential dictatorial powers under Art. 48 are so broad that "it operates (in fact, not in its legal establishment) as the residue of the sovereign dictatorship of the National Assembly." In other words, Schmitt's suggestion is that in substantive, though not formally legal, terms, the dictatorship of the Reichspräsident is commissioned *not* by any *constituted* power of the existing legal order, but by the *constituent* power that preceded that order. See McCormick, "Schmitt on Dictatorship, Liberalism, Emergency Powers," 205 in Baehr, P. R. and M. Richter (2004). *Dictatorship in history and theory : Bonapartism, Caesarism, and totalitarianism*. Washington, D.C., German Historical Institute and Cambridge University Press. For competing interpretations, see Caldwell, P. C. (1997). *Popular sovereignty and the crisis of German constitutional law : the theory & practice of Weimar constitutionalism*. Durham N.C., Duke University Press and Andrew Arato, "Goodbye to Dictatorship?"

³³ McCormick, "Schmitt on Dictatorship, Liberalism, Emergency Powers."

modernity, Schmitt recognized that the people had replaced God or the Monarch as the sole legitimate bearer of the constituent power, and thus provided an image of revolutionary constitution-making as a radical democratic act of the sovereign people deciding on the political form of their collective existence.³⁴ Placing this account of sovereignty as democratic constituent power at the center of Schmitt's theory, Kalyvas suggests that *Political Theology* too, must be interpreted as referring to the sovereign people, on whose decision the legal order rests.³⁵ On the other hand, the theory of commissarial dictatorship praised by McCormick is criticized by Kalyvas as a reflection of Schmitt's authoritarian, repressive, statist inclination that for Kalyvas must be distinguished from the core theory of democratic sovereignty.³⁶

These accounts of a radical, democratic sovereign exception could not be more at odds with McCormick's conclusion of a fascist one. Which is the more plausible interpretation for understanding the exception as it relates to emergency powers? I want to defer answering this question directly, and instead argue from the perspective of what Schmitt identified as the entity that must be preserved, and how he identified the nature of the possible emergency threats. I want to show that establishing this perspective is important for adequately answering the question I've laid out about emergency powers and the exception, since it establishes the determinate political content of these concepts.

The state and the political

³⁴ See Negri, A. (1999). *Insurgencies : constituent power and the modern state*. Minneapolis, University of Minnesota Press.
and Kalyvas, A. (2008). *Democracy and the politics of the extraordinary : Max Weber, Carl Schmitt, and Hannah Arendt*. Cambridge ; New York, Cambridge University Press., especially 88-100. For a subtle and incisive critique of the democratic nature of this theory, see, Arato, A. (2000). *Civil society, constitution, and legitimacy*. Lanham, Md., Rowman & Littlefield Publishers., ch 8.

³⁵ Kalyvas, 94. Ellen Kennedy makes the same assertion in "Emergency and Exception," 536.

³⁶ Kalyvas, *Democracy*, 93.

Gopal Balakrishnan has argued that while Schmitt's Weimar writings have not remained consistent with one another in terms of the solutions they advocate, there is a strong consistency among them in terms of underlying subject matter. They explore from different perspectives the same intense preoccupation with what Schmitt saw as the threats to Germany's existence as a sovereign state. These threats stemmed from a variety of sources, but two of the most important were the transformation of the international order and Germany's position in it, as well as the transformation in the relations between state and society catalyzed by the parliamentary mass democracy of the Weimar republic.³⁷ Domestically, these developments made it virtually impossible for the state to act as an autonomous political agent, distinguishing itself from and standing above a "nonpolitical" realm of society. Rather, the state found itself *occupied* by society, in the form of mass electoral parties each purporting to represent the interests of a particular social group in parliament. In this way the state became a forum in which multiple, often fierce social antagonisms and conflicts were expressed. Internationally, it was the system of independent, formally equal sovereign persons, each possessing full *jus belli*. Seen from the tumultuous perspective of the Weimar republic, the post-WWI transformations of the interstate order, the rise of multiparty pluralist liberal democracy, and the intensity of class conflict established the conditions where emergency threats to the state could have explosive and shattering effects. I want to briefly demonstrate how the basic categories of Schmitt's theory were crafted to diagnose and respond to this condition, and build from these to reconstruct his theories of the exception and emergency powers.

³⁷ Balakrishnan, *The Enemy*; Ulrich Preuss, "Political Order and Democracy: Carl Schmitt and his Influence," in Mouffe, C. (1999). *The challenge of Carl Schmitt*. London ; New York, Verso.

The Concept of the Political opens with Schmitt's assertion that "the concept of the state presupposes the concept of the political."³⁸ This fact, according to Schmitt, is overlooked by the prevailing social scientific tendency to define the political with reference to the state, thereby resulting in vagueness and circularity. Likewise, the problem with prevailing juridical criteria of the political is that they presuppose the state to be in all cases the "unequivocal and eminent entity confronting nonpolitical groups and affairs – in other words for as long as the state possesses the monopoly on politics."³⁹ Schmitt's point is that the vagueness and insufficiency of these definitions has become especially problematic at the historical juncture where this conception of the state as the exclusive political entity, standing apart from a non-political society, can no longer be taken for granted. According to Schmitt, liberal pluralism and mass democracy have resulted in an "interpenetration" of state and society, fragmenting the character of the state as a unitary agent, and transforming it into a forum occupied by a multiplicity of social interests and groups engaged in endless, unprincipled bargaining and maneuvering. In such conditions, anything in society is open to becoming politicized, and inversely the state has lost its claim to having a self-evidently political character.⁴⁰ Once the state/society antithesis have been called into question, it clearly no longer suffices to define the political as competition for power to influence the state, since it is not clear anymore what makes the state "political" in the first place. This is the situation to which Schmitt's famous definition of the political as the distinction between friend and enemy is directed. If it's no longer self-evident that the state is the sole, exclusive form that *political* association could take, this means that the state could not necessarily be assumed any longer to be the exclusive authority for deciding friend/enemy distinctions that take priority for a population over all other memberships and allegiances.

³⁸ Schmitt, C. (2007). *The concept of the political*. Chicago, University of Chicago Press.,19-21.

³⁹ Ibid., 22.

⁴⁰ Ibid., 32

This, for Schmitt, was epochal transformation in the concept of the state as it had existence from the mid-17th century. The modern state emerged through the pacification of internal conflict and the assertion of unified, comprehensive jurisdiction within a territorial order. Such a state enjoyed exclusive rights of war and peace, and authority over matters of collective security and self-preservation and freely distinguished between friends and enemies on its own terms. The essence of the modern state was its status as the decisive political entity for a territory and a population.⁴¹ And as long as this theory coincided with political reality within Europe, the problem of defining the political independently of the state did not emerge. What Schmitt's isolation of the political apart from the state reveals, however, is the vivid possibility that non-state associations emerging from society may gain the capacity to make friend/enemy distinctions of their own, which cut across and supersede national territorial boundaries.⁴² If, in the extreme instance of violent conflict, party allegiance subordinates all others and members are willing to risk their lives for the sake of the party rather than the state, it is the party that is the political entity in this case. As a keen reader of Marx, Lenin and Lukacs, Schmitt was especially attentive to the possibility that, in the context of class conflict, economic class could intensify beyond the point of a merely "private" association and become the decisive entity, gaining the capacity to distinguish friends and enemies along the lines of international class struggle and displacing the nation state altogether as the primary unit of the political.⁴³

Ulrich Preuss, stressing the historical context of Schmitt's thought, has argued that the decisive point of reference for Schmitt's Weimar writings was the emergence of political cleavages in which "the identification of one social class with 'the people' as the undisputed

⁴¹ Ibid., 45-6, 74 and especially 63.

⁴² Ibid., 32

⁴³ Schmitt makes this explicit in Ibid., 37 and 39. See also, Schmitt, C. and J. Seitzer (2008). *Constitutional theory*. Durham, Duke University Press., 263-4.

holder of sovereignty... revolutions have become more or less concealed class struggles – or, in other words, class struggle has been politicized, with the consequences that the economic and social conflict has escalated almost to the level of modern religious civil wars. This class struggle evidently lurks in the background of Schmitt’s concept of the political...”⁴⁴ From this perspective, a major focus of Schmitt’s attack on liberalism was that it blinded and deprived itself of the means to fight its own enemies. From Schmitt’s perspective, liberal pluralism was incapable of grasping the possibility of economic conflict to transcend private interest and take on an openly political intensity directed against the state itself. Moreover, Schmitt claims that liberalism’s squeamishness about repression, and about state power in general, leave it unguarded and defenseless against its more politically astute enemies.⁴⁵ Paradoxically, the depoliticized, liberal pluralist state may extend its reach throughout the whole of society, yet “it is allowed to do nothing. In particular *it must not defend its existing form in any crisis...*”⁴⁶ In other words, the inability of the liberal state to distinguish between friends and enemies is reflected by the inability to distinguish or decide about the priority between the ordinary functioning of liberal pluralist norms from the political identity of the state and its form of existence in the event that they come into conflict.⁴⁷

The State and the Exception

⁴⁴ Ulrich Preuss, “Political Order and Democracy,” 173. Carl Schmitt’s “thought belongs to the age of European revolutions which released the dynamics of capitalist society, and his intellectual originality consisted in the uncompromising and unrivalled radicalism with which he tried to preserve the values of nineteenth century bourgeois order under conditions of mass democracy and its social and political struggles during the first half of the twentieth century,” Ibid., 178.

⁴⁵ 70-1. See also Cristi, R. (1998). *Carl Schmitt and authoritarian liberalism : strong state, free economy*. Cardiff, University of Wales Press.

⁴⁶ Schmitt, *Concept of the Political*, approvingly quoting Burckhard (my italics), 23.

⁴⁷ *Constitutional Theory*., 35; 43-4.

From this perspective it becomes clearer how Schmitt's understanding of modern state and the crisis facing it is built into his basic theoretical concepts and categories, from which the concepts of emergency powers and the exception are drawn. By far the clearest and most systematic elaboration of this theoretical background is Schmitt's major theoretical treatise, *Constitutional Theory*. In that text, the understanding of the political that was isolated and scrutinized on its own in *The Concept of the Political* becomes the basis for Schmitt's reconstruction of fundamental concepts such as the state, constitution, sovereignty, the people, the exception, etc. There he defines the state as "the political unity of the people." In theoretical terms, this political unity is determined by some combination of an immanent *identity* of its members, and a *representation* that symbolizes to the members their "higher" existence as political unity.⁴⁸ In every case, however, the necessary condition and "essential presupposition of the political existence" of any state is that it has the capacity to distinguish between friend and enemy for itself.⁴⁹ Schmitt's own preferred definition of a constitution is not a contract or a collection of constitutional provisions but is defined as the concrete, self-conscious decision made by a political unity about the form of its political existence. The state, in this understanding, necessarily preexists the constitution it gives itself, and as long as the people continue to exist as a political unity, the state is always free to decide anew on the form of its political existence.⁵⁰ Schmitt distinguishes this idea of a constitution from the sum of all constitutional laws and provisions in a constitutional text. Not all constitutional laws are a part of the constitution proper. Only the provisions of the text that form a singular decision on the type and form of a people's political existence – such as the form of government, separation and division of powers and even potentially the preamble and table of rights if they are the products of a political will to some

⁴⁸ Ibid., 239

⁴⁹ Ibid, 207, 247.

⁵⁰ Schmitt calls this the "positive conception" of the constitution. Ibid., 74-96.

concrete and determined existence – make up the constitution proper. The constitution in this sense is inviolable, unchangeable by any constituted power, and is the source from which all constitutional laws and statutes derive their validity. Only the latter, and not the former, can be changed through constituted, procedural means such as amendment.⁵¹

Thus, at this stage Schmitt has already built in three distinct levels of priority as they concern the “self” of self-preservation. On the most basic level, the state itself preexists its own constitution, and the state’s political existence as such evidently takes precedence over any particular form of existence it has chosen for that time to give itself. Secondly, however, according to Schmitt’s definition not only the state as such but also of the constitution is literally an existential value since it reflects the state’s fundamental decision about its form of political existence. The constitution and the state’s political existence effectively amount to the same thing:

Every existing political unity has its value and its “right to existence” not in the rightness or usefulness of norms, but rather in its existence.... Consequently, its “right to self-preservation” is the prerequisite of all further discussions; it attempts, above all, to maintain itself in its existence, ‘in suo esse perseverare; (Spinoza); it protects ‘its *existence*, its *integrity*, and its *constitution*,’ which are all existential values.⁵²

Interestingly, Schmitt has defined constitution in such a way that absorbs the bedrock principle of self-preservation, and is *not* reducible whatsoever to legality, or mere constitutional law, which are of secondary priority and have authority by virtue of the constitution as a decision about a mode of political existence. Thus, the third level involves the authority to suspend or

⁵¹ Ibid., 78

⁵² Ibid., 76.

violate constitutional *laws* for the sake of preserving the constitution as a mode of political existence. Here Schmitt argues, referring to Art. 48 of the Weimar constitution, that during a state of exception the president is entitled not only to suspend certain constitutional rights that are enumerated by name in the Article. Further, Schmitt argues that the President may issue measures that violate other constitutional provisions beyond the ones explicitly enumerated. Denying this on the grounds that the “constitution is inviolable” according to Schmitt is based on the false premise that confuses the constitution with every individual constitutional law, refusing to acknowledge a difference in importance between the provision establishing the German Reich as a republic, and provisions regulating the personal papers of civil servants.⁵³ For Schmitt, it follows necessarily from the *inviolability* of the constitution that there must be a distinction between it and constitutional laws that *can* be violated, when necessary, to preserve the constitution. To deny this would mean, effectively, placing “the individual statute above the entirety of the political form of existence.”⁵⁴

At this point we can clarify in formal, theoretical terms Schmitt’s answer to our question about the terms by which it is possible to distinguish “emergencies” that would require an exception from the ordinary condition of political “normalcy” in which all norms in the legal order apply. An emergency is a threat to the state’s existence, which is to say a threat the specific form of political existence that a people as a political unity has decided for itself, the defense of which requires suspension of constitutional laws or statutes. Any state, insofar as it has decided on a concrete form of existence, necessarily wills the means of its self-preservation. The “self,” however, of Schmitt’s formulation of self-preservation is not reducible to neutral criteria like physical integrity or safety. It could likely include something like a way of life, insofar as that is

⁵³ Ibid., 80-1.

⁵⁴ Ibid., 80

the object of a fundamental decision, or what he refers to as “the proclamation of a ‘new state ethos.’” Political existence never has an entirely static, self-enclosed character since for Schmitt it necessarily entails particular relations to the concrete political existence of other entities, including as a necessary precondition the possibility of enmity.

The three levels at which we could potentially identify a political entity – the level of the *state* or the political unity of the people that may preexists or outlive any particular constitution, the level of the *constitution*, or the concrete form of political existence a people gives itself, and the level of the *legal order* or the system of constitutional laws and statutes whose validity derives from the constitution. The third level of the legal order is clearly what Schmitt refers to as “the normal situation [that] is the prerequisite for legal norms to be valid.”⁵⁵ Establishing and preserving a condition of normality and the ordinary functioning of the legal order is simply to fully realize and apply the constitution it has given itself, and is therefore necessarily the end of any state whether in ordinary or extraordinary moments.

The second level concerns the inviolability of the constitution, as distinct from constitutional laws that may be temporarily suspended or violated for the sake of preserving the constitution. I will call the suspension of constitutional laws but not the constitution *emergency powers*,⁵⁶ which refer to measures that are temporary, do not violate provisions of the constitution itself and stop short of enacting permanent law or constitutional change. Schmitt argues in the case of Art. 48, and implies more generally, that as long as these conditions are met the emergency measures can be regarded as authorized by the constitution, even if there is no explicit textual authorization for the particular measures or laws violated. The discussion of Art. 48 in *Constitutional Theory* and

⁵⁵ Schmitt, *Concept of the Political*, 46.

⁵⁶ I realize I risk confusion here since Schmitt in both *Constitutional Theory* and *Dictatorship* refers to the state of exception rather than emergency powers, but what matters here is the conceptual distinction rather than the semantics.

the model of commissarial dictatorship in *Dictatorship* both qualify as emergency powers in this case. As the model of constitutional dictatorship made clear, a final condition of emergency powers is that whatever their temporary powers may be, they remain limited, constituted powers strictly barred from the sovereign power to transform the constitution. Thus, if the president (in the Weimar case) invokes Art. 48 in order to not just violate certain basic rights temporarily, but to actually *abolish* the basic right permanently, this is no longer a constitutionally authorized emergency measure, but now impinges upon the fundamental political decisions and substance of the constitution.⁵⁷ By making permanent changes to the constitution itself, the president is no longer acting as a limited, constituted power but as a sovereign, or constituent power.

The third level concerns the distinction between the constitution and the political entity that creates the constitution. The third level, in other words, Schmitt is clear that if the constitution is a decision by a politically unified people about its existence, then this political unity must already be in existence in order to make a decision about itself. The state, then, preexists the constitution it creates; it is the constituent power. For the same reason, a people that has become aware of itself as a constituent power cannot be bound by its own creation but retains the authority to give itself a new constitution whenever it chooses. This, of course, is the level from which authors such as Negri and Kalyvas have drawn their account of democratic constituent sovereignty. It is also the account Schmitt gave in his theory of sovereign dictatorship, as the revolutionary agent of the sovereign people, commissioned to use extraordinary measures to bring about a new, future constitutional order.

Democracy and the Plebiscitarian Exception

⁵⁷ Schmitt, *Concept of the Political*. 80

Let me recall the diagnosis we saw in *Concept of the Political*. I argued that text must be read as an account of the crisis of the modern state losing its status as the unique political entity, and from that account sketching a series of possible forms in which this threat could be identified, including the interpenetration of state and society, and the intensification of class conflict to the point where new friend/enemy groupings emerge on the field of the social, rather than the state. The fusion of revolutionary popular sovereignty with class struggle, creating “the identification of one social class with ‘the people’ as the undisputed holder of sovereignty” is precisely the radical danger expressed by Schmitt’s early concept of sovereign dictatorship. While the original model was the French Revolution, Schmitt repeatedly stresses that the contemporary embodiment of the concept in the dictatorship of the proletariat, which radicalizes the future orientation of sovereign dictatorship and regards the state apparatus itself as an unconstrained coercive means to create the conditions of a future communist society in which it can ultimately wither away.⁵⁸ Thus, dictatorship of the proletariat is a full realization for Schmitt of the most radical dangers of sovereign dictatorship, in which an as yet unrealized future state of affairs, however distant or vague, legitimates an unconstrained and unbounded strategic use of state coercion and violence. In this context, Schmitt notes, the earlier liberal toleration for ‘mild’ commissarial dictatorship is irreversibly transformed. In the world of 18th century liberalism, the state confronted a “non-political” society composed of private individuals. Mild emergency powers such as “fictive state of siege” might be necessary to disperse the occasional crowd and keep the rabble in order, but remained limited in scope. Schmitt suggests that 1848, and the emergence of the European proletariat as a revolutionary force, fundamentally changed the coordinates of the state’s relationship to society, transforming the social realm into a kind of

⁵⁸ Schmitt, C. (2000). *La Dictature*. Paris, Editions du Seuil.

semi-permanent emergency for the state and requiring an armory of much harsher emergency powers than liberalism was prepared to accept.⁵⁹

Thus, the commissarial/sovereign distinction reflects Schmitt's concrete diagnosis of the emergency at hand. Sovereign dictatorship brings to light the dangerous possibilities of the principle of popular sovereignty, which can take the form not only of the foundation of the liberal state but also as a concrete political "enemy" of that state, in the form of the dictatorship of the proletariat. In this context, the tendency of liberal, "bourgeois" political thought to assimilate dictatorship to a generic label for authoritarianism represents for Schmitt a dangerous intellectual tendency stemming from liberalism's inability to identify its enemies. Against the utopian rationalism of sovereign dictatorship and the liberal rationalism of a self-enforcing system of constitutional norms, Schmitt defends the idea of conservative commissarial dictatorship as a crucial institution for preserving the republican constitutional state in a political world that is inevitably beset by emergencies and exceptional situations.⁶⁰

While McCormick overlooks this context of *Dictatorship*, he also erroneously attributes to *Political Theology* a view of the president endowed with extraconstitutional powers by virtue of his "personal embodiment of the popular will[...]"⁶¹ As McCormick discusses, this plebiscitarian basis of presidential authority became an important theme that is integrated with emergency powers in Schmitt's later Weimar writings, but such positive references to popular sovereignty or plebiscitarianism are strikingly absent from *Political Theology*. Indeed, that context contains no positive references to democracy or the principle of popular sovereignty at all. On the contrary, the book closes with an appreciative discussion of the counterrevolutionary conservative theories of de Maistre, Bonald and Donoso Cortés. The latter in particular

⁵⁹ *La Dictature*, 207-259.

⁶⁰ Ibid. Balakrishnan, *The Enemy*, chap. 2.

⁶¹ McCormick, "Dilemmas," 229.

fascinates Schmitt because, writing after 1848, recognizes the unavoidability of democratic legitimacy and the collapse of monarchical legitimacy, and therefore advocates permanent repressive dictatorship as the only remaining possibility to preserve the principle of state authority from democratic immanence. *Political Theology*, in other words, examines the same problem of the crisis of the state through the politicization of the social, but instead toys with the opposite solution of a permanent, sovereign, counterrevolutionary dictatorship.⁶² Finally, the plebiscitarian presidential model, to which McCormick assimilates *Political Theology*, should be regarded as a third model altogether. The fundamental difference is that, while commissarial dictatorship and the decisionist, counterrevolutionary dictatorship are both seen as measures *against* revolutionary popular sovereignty, the plebiscitarian model reflects Schmitt's later view that we saw in *Constitutional Theory*, that popular sovereignty can also be a crucial means of *strengthening* state authority against society rather than weakening it. Thus, while McCormick is clearly correct in emphasizing the important differences between Schmitt's theories of commissarial dictatorship and the state of exception, and his contrast between the two models is important and illuminating. On the other hand, by uncoupling the structure of the state of emergency from the question of how the emergency is identified and what is under threat, McCormick's account overlooks an important dimension of continuity between the two models, and distorts his interpretation of the models of emergency powers themselves. Both commissarial dictatorship and the sovereign decision as different responses to the underlying emergency threat, however, a more complex picture emerges of republican and anti-republican strains throughout Schmitt's Weimar writings, and qualifying McCormick's endorsement of Schmitt's commissarial theory of emergency powers as a positive model for liberals.⁶³

⁶² See Balakrishnan, *The Enemy*, ch. 3; Renato Cristi, *Carl Schmitt and Authoritarian Liberalism*

⁶³ *Dictature*, 241

The argument for restoring the concrete political referents of Schmitt's concepts of emergency powers and the exception is to say that they are not valuable means for understanding the present. Rather, I think their value today resides to a large extent in that by reflecting on the differences between Schmitt's context and political ends and our own, we are forced to reflect on what is distinctive about the underlying assumptions of contemporary emergency politics: how is an emergency identified and what is understood to be under threat? How do institutional arrangements and proposals reflect those assumptions and attempt to intervene in them? With these questions in mind, I now want to turn to two contemporary theories of emergency powers.

II. Emergency Powers, Self-Preservation and Security

Turning to the major debates that characterize the state of the current field, I shall set out a typology of four basic frameworks for analyzing the purpose and function of emergency institutions. These different institutional models give different answers to the question of which institutional actor is supposed to identify a state of exception, as well as the institution authorized to exercise emergency powers and the institutional sources of oversight or restraint. What these different institutional arrangements have in common, however, is not only the scant attention given to the problem of what counts as an emergency. The second commonality among these various authors is an implicit or tacit account of the necessity of emergency measures that shifts from an existential logic of self-preservation (emergency measures that are necessary to save the state or constitutional order from destruction) to a looser, more expansive logic of security (measures that are necessary reassure a frightened populace, or decrease the probability of harm). In other words, I will argue that although the problem how what constitutes an emergency is left

under-theorized in each case, we can nevertheless observe in the defenders of each model a tension between the necessity of self-preservation and the necessity of security as criteria for a state of emergency. Whereas the justification of emergency powers is often drawn from necessity as a logic of self-preservation, the *purpose* and *scope* of emergency powers are premised a different conception of necessity as a logic of security rather than self-preservation.

Thus, while the detailed focus on institutional design is a welcome and important addition to the literature, the associations claimed by scholars between specific institutional frameworks and specific political outcomes remain somewhat indeterminate. Hence, in the ongoing debate over within this literature over which institutional model will best restrain emergency powers and prevent their abuse and normalization, the most important advocates of the competing models – such as Bruce Ackerman and Oren Gross – have excluded precisely what mediates between formal institutions and concrete political outcomes, and hence what would provide traction and determinateness in the ongoing debate: the realm of political judgment and interpretation that determines the identity and value of what must be preserved, and therefore what counts as an emergency in the first place.

Oren Gross' containment strategy

One prominent model of emergency powers has been proposed by Oren Gross as “extra-legal measures.” This idea distinguishes between normal and exceptional states and restricts emergency powers to the latter, it also falls under the dualist genus. In contrast with legal dualism, however extra-legal dualism proposes that emergency powers should be employed *outside* the legal order, “extra-legally.” Theorists of extra-legal emergency powers share the legal dualists concern for maintaining the integrity of the rule of law, but they argue that establishing

procedures and providing legal sanction for emergency powers will lead to their increased use and abuse, thereby undermining the state of ‘normalcy’ itself. Instead, if emergency powers are found to be necessary, their exceptional and extra-legal character should be frankly acknowledged and highlighted, and exposed to the light of public evaluation afterward. Of the several recent accounts of extra-legal dualism, I shall take Oren Gross’ proposal as an example of this approach.⁶⁴

How does Gross identify the criteria for establishing when an emergency is severe enough to make extra-legal emergency powers legitimate? He sometimes suggests that there is no need to stipulate criteria in advance; it seems to be up to the public official to decide when an emergency is extreme enough to make it necessary to act outside the law, as long as it is frankly acknowledged as such. Once the emergency is over the extra-legal actions must be submitted to public judgment or “ratification,” so that it is the public that ultimately determines whether the official’s earlier judgment of necessity was valid or invalid.⁶⁵ The criteria for how such a public judgment might be made, however, remains quite abstract. Gross indicates the criteria he has in mind with terms such as “severe crisis,” “dangerous exigency,” “severe emergency” and the like, but what, if any boundaries these terms stipulate remains vague.

Gross supports his case for the extra-legal measures model with a wide-ranging survey of alternative institutional models for dealing with emergencies. His actual justification for extra-legal measures, however, can be summarized in three basic claims. First, Gross’ fundamental premise is that politics inextricably involves the potential for unpredictable and dangerous emergencies. The potential for such emergencies logically entails the inextricable possibility of

⁶⁴ For other proponents of this model, see Mark Tushnet, “Defending Korematsu?” in Tushnet, M. V. (2005). The constitution in wartime : beyond alarmism and complacency. Durham N.C., Duke University Press.

⁶⁵ 137-9.

necessary emergency measures that conflict with the rule of law.⁶⁶ Secondly, he argues that neither institutionalized dualist models of emergency powers, nor the monist alternatives, are capable of maintaining the integrity of the “normal” constitutional order; both forms are vulnerable to gradually assimilating and incorporating exceptional powers within the legal order. Since legal dualism is unstable but since the potential of emergencies cannot be eliminated, when emergency measures are necessary, they should be extra-legal. Both fundamental steps in Gross's argument depend on the concept of necessity; more precisely, they hang on an ambiguity of the concept necessity, which “doubles the parts of indispensable and inevitable.”⁶⁷ Thus, on the one hand he explains that extra-legal action is legitimate when “such action is necessary for protecting the nation and the public in the face of calamity,” that is, such action is *indispensable* for the preservation of the nation against a threat.⁶⁸ Elsewhere, Gross places more emphasis on the second sense of inevitability alongside the first:

When faced with serious threats to the life of the nation, government will take whatever measures it deems necessary to abate the crisis. Regardless of whether government ought to do so, history demonstrates that it does.

Here necessity means indispensable in the immediate sense, but in terms of the broader point of the sentence makes a claim about inevitability as well. The double sense of necessity, therefore, describes a judgment in the present, and also makes a claim about the future: “if the necessity is extreme and grave, it may well be that what is necessary is for the executive to disregard

⁶⁶ Typically this premise is asserted as self-evident. For example, “Violent emergencies challenge those tenets [of the liberal legal tradition of generality, publicity and stability of legal norms], since they often call for particularly and extremely broad discretionary powers,” Gross, O. and F. Ní Aoláin (2006). *Law in times of crisis : emergency powers in theory and practice*. Cambridge, Cambridge University Press., 2.

⁶⁷ Quoted in Walzer, M. (2006). *Just and unjust wars : a moral argument with historical illustrations*. New York, BasicBooks., 8.

⁶⁸ Gross, *Law in Times of Crisis*, 111.

constitutional obligations and act against explicit constitutional dictates and statutory norms if, again, that is what must be done to save the nation.”⁶⁹ From the idea of the necessity of emergency measures, defined as whatever would be indispensable to self-preservation in the event of some unknown emergency, Gross moves to the inevitability of such measures actually being employed once the unpredictable emergency in question actually occurs. Exploiting this double sense of necessity helps to establish an aura of logical certainty around the claim that emergency measures challenging the rule of law *will* be employed at some point, though we cannot predict or foresee when or against what threat. This aura of certainty, of course, is illusory and does nothing to change the abstract, speculative nature of the claim. Finally, to compound the ambiguity, Gross occasionally drops the reference to the self preservation altogether and shifts to a much broader meaning of extra-legal action to “advance the *public good* under circumstances of great necessity,” or that the only relevant criteria for extra-legal actions is that they are “*genuinely* for the public good.”⁷⁰ The criteria for the validity of extra-legal emergency action, in other words, is so lacking in determinate content that it can slide between action that promotes the public good, and an action necessary for self-preservation, without apparent consequence.

Extra-Legal torture warrants

The same problem of indeterminate categories is demonstrated in more detail in an article by Gross applying his model to the problem of torture.⁷¹ Gross tells us that he wishes “defend an

⁶⁹ Ibid., 52

⁷⁰ My italics: 137, 143, see also 152.

⁷¹ Oren Gross, “Are Torture Warrants Warranted?” *Minnesota Law Review* 88 (2004). My analysis here is influenced by Kevin Jon Heller, “The Rhetoric of Necessity (Or, Sanford Levinson’s Pinteresque Conversation,” *Georgia Law Review* 40 (2006) and Leonard Feldman, “Terminal Exceptions: Law and Sovereignty at the Airport Threshold” *Law, Culture and the Humanities* 3, no. 2 (2007).

absolute prohibition on torture,” according to which torture is categorically prohibited on *a priori* grounds. At the same time, Gross claims that

the way to deal with what may be called the “extreme” or “catastrophic” case is neither by reading it out of the equation nor by using it as the center-piece for establishing general policies. Rather, the proposal made below focuses on the possibility that truly exceptional cases may give rise to official disobedience [i.e. the extra-legal measures model].

Although he does not use the term itself in this passage, his idea here seems to rely on the same double sense of “necessity” that we saw earlier. Gross’ argument begins by invoking the idea of an “extreme,” “catastrophic” circumstance, which is simply a circumstance defined as one in which torture would be necessary, in the sense of *indispensible*. On this basis, since we know with certainty that in the event that such an “extreme” case arise the use of torture would be *inevitable*, it would be an irresponsible form of denial to refuse to squarely face this fact and acknowledge it. Gross characterizes his own stance on torture as a categorical prohibition, seemingly on account of his belief that in the extreme case torture would be an inevitability for all absolutists, and moreover that according to his extra-legal measures model the inevitable torture would be illegal (though the torturer would have the chance to be exonerated *ex post*) and therefore, in a sense, legally prohibited.⁷²

This extreme or catastrophic case that combines the indispensability with the inevitability of torture, turns out to be n the well-known “ticking time bomb” counterfactual invoked by Alan Dershowitz, among others, as an argument for legalizing torture.

⁷² Thus Gross his idea of “pragmatic absolutism” as follows: “[w]hile non-consequentialist reasoning supports a *ban* on torture, it does not, in and of itself, present a compelling case for an *absolute* ban,” 7. I am not sure that this is logically coherent, but I will not pursue that issue here.

Consider, for example, a ticking bomb scenario when the suspected terrorist is captured by state agents in the mall where he planted the bomb and as the bomb may go off shortly, he is interrogated on the spot. Should he refuse to divulge information about the location of the bomb and the bomb goes off he, as well as thousands of innocent civilians in the mall, will be killed in the blast.

Although Gross acknowledges the arguments of critics that the counterfactual is built upon a series of conditions that are not only implausible but mutually exclusive in practical terms. For instance, to have the intended effect of justifying torture the scenario requires that officials have total certainty that 1) the suspect in custody really is a terrorist and they will not torture the wrong guy by accident and at the same time 2) they have no idea and have no other possible means of finding out information about the known terrorists' activities. The officials have absolute certainty 3) that a bomb exists in the mall and is about to explode immanently and moreover 4) that the suspect knows the whereabouts of the bomb, so that his protests to the contrary are in fact lies that he will continue to tell until 5) he is tortured, they will know how to distinguish the he has been telling lies from the truth, and moreover not only do they have certainty beforehand that the torture will succeed in saving lives, but moreover 6) only torture and *nothing else* will work (so that for instance there is sufficient time to torture the suspect into divulging the location of the bomb and diffusing it, but somehow there was insufficient time to simply evacuate the mall during the same interval. And so on.⁷³

Gross, oddly, is not concerned with the absence of any evidence of so many implausible conditions every occurring simultaneously in reality.⁷⁴ He simply notes that such a case would be

⁷³ For a more detailed deconstruction of this hypothetical, see...

⁷⁴ The one example that Gross cites is an obscure German kidnapping of the child of a wealthy industrialist, from 2002. The kidnapper, already in police custody, at first would not divulge the whereabouts of the kidnapped child, and subsequently revealed the information after police *threatened* to use torture. The police arrived at the location

an exception rather than a norm, and therefore should not be the basis of a rule. At the same time, he warns, “one should not ignore the reality of hard cases, however rare they may be,” and repeats that the catastrophic case is not artificial but “real,” and to ignore the reality of the catastrophic case is “utopian or naïve.”⁷⁵ That Gross could flatly make this claim about a hypothetical scenario is astonishing. A footnote directs the reader to “see Part II” of Gross’ article, which discusses a variety of hypothetical constructions by moral philosophers and legal theorists (most of the cartoonishly implausible classroom variety, such as Kant’s famous verdict that it would be immoral to lie about the whereabouts of a friend, even to prevent the friends murder if the inquirer is an armed assassin, or Alan Dewirth’s quandary about whether a mother has any rights not to be tortured to death by her son, etc), but *not one single empirical case* that even approximates the conditions stipulated by the ticking time bomb scenario.

Even more bizarrely, Gross rejects the argument for legalization of torture, and defends an *absolute* legal prohibition on torture, while at the same time describing hypothetical constructions as “real” evidence that extra-legal measures must include the possibility of torture. It is very striking that Gross does not see any difficulty in the idea that one can endorse an absolute, categorical prohibition on torture, and at the same time without contradiction affirm a set of conditions in which torture would be justifiable as an extra legal measure. The case of torture, however, is an extreme example of a suppressed tension in the extra legal measures model in general: the model endorses, on the one hand, the view that officials may be justified in taking emergency measures that violate the law and in such cases should not face legal sanctions

only to discover that the victim had been murdered long before the interrogation took place. It’s not clear what this bizarre example is supposed to demonstrate, since it bears little resemblance to the ticking time bomb scenario. Needless to say, the police in the real-world case were in the dark about nearly everything, most importantly about the fact that the victim they were frantic to save at all costs was in fact already dead, and moreover the information was divulged without any torture actually taking place. Gross, 122, fn 74.

⁷⁵ Ibid.,

for their acts, and on the other hand, that because a publically approved and indemnified action does not claim any legal authority, having such a model in place is not a “dualist” legal procedure, nor does it affect or alter the inviolability of legal norms. This seems to raise a number of difficulties. One set of questions, which I will only mention without pursuing, involve the question of whether the extra legal measures model is in any coherent or meaningful sense *not* a part of the legal order. For example, to say that a law can and should be violated under certain circumstances for which the sanctions attached to violation would be suspended, doesn’t this unavoidably affect the substance of the law itself? Does it really leave the law utterly untouched to have such a model in place? Moreover, if the model stipulates conditions under which an official may decide to act in violation of a legal norm, in anticipation of a procedure for judging the validity of the action, with the authority to waive the penalty ordinarily proscribed for the violation, then it is unavoidably a part of the legal order materially if not formally, and cannot plausibly be described as totally separate and sealed off from it.

This tension becomes especially troubling in relation to Gross’ view of the reality that extra-legal torture will be in exceptional circumstances justified. The unwarranted conclusions about the inevitability of torture, combined with his questionable assumption that extra-legal torture leaves the integrity of an absolute legal ban intact. The result is a seriously distorted picture of the permissibility of torture that effectively inverts the moral and legal stakes that it initially invokes in the absolutist position. Once justified torture is seen as inevitable, it can appear that the absolutist prohibition turns out to be permissive, and the permissive position has a better claim to the status of an absolute prohibition. As he puts it, “[t]he question then becomes not *whether* state agents will use preventive interrogational torture in the face of a moral principle to the contrary (*they will*), but rather what moral judgment and legal effect should

accompany such action.”⁷⁶ Echoing Dershowitz’s own reasoning, Gross insists that by “not discussing the practice of torture we do not make it go away; we drive it underground.”⁷⁷ It is the advocates of an absolute ban on torture – and refuse to make an exception for extra-legal torture – who in reality are endangering the rule of law. In the absolutist scenario, the public may come to regard

the legal system as unrealistic because it fails to adjust to the needs of fighting national crises. As a result, particular norms, and perhaps the legal system in general, may break down, as the ethos of obedience to law is seriously shaken...”

The premise here, once again, is that the question of torture is not *if* but *when* and *how*, and therefore since no honest model is truly an absolutist prohibition, it appears as if the extra-legal measures model is the one that best approximates such a stance, and moreover can maintain a non-hypocritical *legal* absolutist ban.

Ackerman’s Emergency Constitution: Madisonian Engineering

A second example of emergency powers is Bruce Ackerman’s proposal, first published in a long 2004 article, and later extended in *Before the Next Attack*, for an institutional, procedural framework of emergency powers. Ackerman’s proposal as a whole illustrates why scholarly work on the design of emergency institutions should not be isolated from a critical analysis of the underlying meaning and criteria of an emergency. Ackerman’s institutional proposal is a creative and sophisticated response to the most harmful institutional dynamics of the current framework

⁷⁶Gross, “Torture Warrants,” 1514.

⁷⁷ Ibid.

of emergency powers, containing several resourceful provisions to channel executive emergency powers through multiple levels of oversight, and reinforce the separation of powers at the points where it has broken down in recent experience and is most urgently needed.

The many ingenious features of Ackerman's proposal, however, risk being overshadowed by a fundamental flaw in the proposal whose source is extra-institutional. Ackerman's critical response to the experience in recent years of emergency powers based upon on a vague and expansive notion of security was unfortunately limited to the institutional level. Even worse, Ackerman adopts wholeheartedly the loose conception of security as a justification for the suspension of ordinary civil rights and procedures. Specifically, he embraces a highly dubious argument that terrorism, by its very nature, is inherently unsuited for the paradigm of criminal justice because it attacks the political conditions that make criminal justice possible. After a quick review of the – mainly positive – institutional features of his proposal, I shall examine more closely Ackerman's arguments about security, terrorism, and the choice between the paradigms of crime, war and emergency. The question, in other words, will be how Ackerman proposes that we distinguish between the normal conditions in which criminal justice is effective, and the "emergency" of terrorism and insecurity that require suspension of the criminal justice model and the activation of emergency powers.

Ackerman is fond of quoting James Madison's succinct justification for his keen interest in institutions: "Enlightened statesmen will not always be at the helm."⁷⁸ This could serve as an especially appropriate motto for *Before the Next Attack*, since its turn to institutional means for counteracting ambition with ambition and multiplying the forms of power and counter-power seem to be motivated by a more genuinely Madisonian sense of anxiety over the demagogic

⁷⁸ See for instance *The Decline and Fall of the American Republic*, 67, as well as *Before the Next Attack*, 4.

potentials in popular politics. Paradoxically, for Ackerman it is precisely the almost total *absence* of formal emergency powers in the US constitution that makes emergency powers so potentially dangerous and destabilizing. Thus, while Ackerman is sympathetic to the civil libertarian concern that emergencies may lead to egregious rights violations, he rejects the rigid monist insistence on the absolute inviolability of rights in emergency and normalcy alike as institutionally naïve and politically counterproductive. For Ackerman, it is a political truism that if constitutionally inviolable rights stand in the way of what political leaders deem to be an effective response to an emergency, “serious politicians will not hesitate before sacrificing rights” to restore public confidence. Moreover, the rigid monist rejection of emergency powers effectively places legality and legitimacy in direct conflict, to the detriment of legality. Such a scenario invites politicians to adopt a heroic pose and “gain popular applause by brushing civil libertarian objections aside as quixotic.”⁷⁹ Secondly, Ackerman is skeptical of the rigid monist tendency to rely upon the judiciary to enforce constitutional limitations and restrain the president in an emergency. Pointing to the disastrous precedent of *Korematsu*, Ackerman argues that the court-centered strategy will similarly backfire. As courts capitulate to the superior legitimacy of the president in an emergency, the decisions that result will validate and integrate temporary emergency rights violations as a *permanent* part of subsequent constitutional *normality*. “The result is the normalization of emergency conditions – the creation of legal precedents that authorize oppressive measures without any end.”

If the rigid monist strategy backfires by encouraging either outright illegality or normalization of the exception, Ackerman is equally critical of the extra-legal dualist solution of preserving the integrity of the legal order by requiring that extraordinary responses to an

⁷⁹ Ackerman, “Emergency Constitution,” 1030.

emergency take place without any legal sanction at all. For Ackerman, this strategy too is likely to produce outcomes that are the opposite of its intended effects – undermining rather than preserving the rule of law. Once lawlessness is made available as a legitimate form of emergency powers, political leaders may find its temptations irresistible, and will have strong incentives to create and recreate the emergency conditions that validate their own extra-legal power.⁸⁰ For Ackerman, since the incentives for politicians to invoke and attempt to exploit emergencies cannot be eliminated or safely contained outside the legal system, the task becomes to channel them through institutional and legal procedures, reintroducing the separation of powers, restrain the scope of exceptional authority, and formalizing their temporary duration. In Madisonian form, Ackerman seeks to create a “political economy” of virtue, structuring institutional incentives and disincentives to ensure that political power remains limited and pluralized.⁸¹

Thus, Ackerman proposes a “supermajoritarian escalator,” mandating quick legislative endorsement to a declared state of emergency, and moreover requiring the legislature to renew the state of emergency regularly, at short intervals. The “escalator” idea is that each time the state of emergency is renewed, an increasingly higher supermajority of legislators will be required. So, for instance, the initial endorsement would require only a majority of legislators, the first renewal would require 60%, the second escalates to 70%, and after the third, remains at the level of 80%.⁸² This feature responds to the obvious danger of illegitimately extending the state emergency longer than necessary by forcing the legislature to regularly reexamine and debate the question of whether the emergency still exists. Secondly, the tendency to settle into a routine reauthorization of the emergency is counteracted by the increasingly high demands of the supermajority. By the time the 80% requirement is reached, Ackerman argues, termination is

⁸⁰ Ibid., 1044.

⁸¹ Ibid., 1031

⁸² *ibid.*, 1047.

virtually inevitable as it is nearly impossible to maintain such a high degree of consensus in modern plural societies for long – unless, of course, the country is subject to regular, continuing attacks that merit the emergency.⁸³ Third, the model is meant to empower and provide political cover for minority parties and civil libertarians, allowing dissenting legislators to point to their first round votes as evidence that they took the emergency seriously at first, but the conditions are no longer present.⁸⁴ At the same time, Ackerman argues, the escalator will have a salutary, moderating affect on the executive, as maintaining emergency authority over time forces him to hold together a larger and larger legislative coalition. This means that executive emergency powers can be maintained only if they do not alienate or demonize particular minority groups that would otherwise be singled out for abuse.⁸⁵

‘Effective sovereignty’ and the expansion of security

In contrast to much of the emergency powers literature, and to his credit, Ackerman is attentive to the distinction between existential *self-preservation* and *security*, and the corresponding distinction between *war* and *terrorism*, both of which form an important part of his argument. Ackerman vividly describes the political incentives for a president to insist that his response to a terrorist attack *is* a loosely defined, global war on terror.⁸⁶

What is the basis, then, for insisting that a terrorist attack is *not* a war but an emergency? The most significant historical precedents of presidential emergency powers, such as the suspension of habeas corpus during the Civil War, or internment of Japanese Americans during World War II – with devastating effects on civil liberties – occurred during wars in which “our political

⁸³ Ibid., 1048

⁸⁴ Ackerman, B. A. (2006). *Before the next attack : preserving civil liberties in an age of terrorism*. New Haven, Yale University Press., 91-2.

⁸⁵ *Ibid.*

⁸⁶ Ibid., 16-7.

existence as a nation was at stake.” Noting that even severe and repeated terrorist attacks do not even come close to threatening the nation’s existence, he remarks of the earlier experiences during war that, “the most important thing to say about these precedents is that they are irrelevant.” Attacks may kill thousands of citizens and terrify millions, but they do not pose an immediate danger to the constitutional order, threaten the state’s control over its territory or impede the functioning of basic political institutions. Ackerman’s argument follows what we could call the *war paradigm*: in response to an existential threat, the executive asserts whatever emergency powers are deemed necessary at the time to overcome the threat and preserve the state, often with devastating effect to civil liberties. The existential logic of the war paradigm asserts the necessary priority of the self-preservation of the state and constitutional order over any particular law or individual right, since the precondition for the legal order and recognition of individual rights is the existence of the state.

The war paradigm’s existential logic also entails a departure from what we can call the paradigm of crime. Criminal justice is predicated on the assumption that criminal guilt is a property of individuals and not collectivities, that it must be proved beyond a reasonable doubt, etc., as expressed by the array of rights and procedural protections that are the basis of the crime paradigm. A fundamental priority of the crime paradigm, therefore, is the *exclusion of false positives*, e.g. minimizing the risk that innocent people are wrongly punished. A fundamental priority of the war paradigm, by contrast, is the *exclusion of false negatives*, e.g. minimizing the risk that individuals who are hostile enemies and may pose some threat to the state are not left free to do harm. Like the argument for the priority of self-preservation over legality, the priority of excluding false negatives has a close affinity with the existential logic of war. Ackerman points out, plausibly, that even though terrorist attacks have nothing to do with the logic of self-

preservation, the rhetorical and legal strategy behind the war on terror was to illegitimately but to some extent successfully employ the war paradigm and invoke some of the most dramatic precedents of past wars, sometimes pushing even beyond these.⁸⁷ Faced with the alarming expansion in response to terrorism of the war paradigm far beyond anything resembling an existential threat, Ackerman proposes the category of “emergency” as a more constitutionally appropriate and politically responsible framework for terrorism.

Why isn't terrorism crime?

Ackerman's critical diagnosis of the response to terrorist attacks with the war model is insightful and compelling, but his argument for why terrorism requires a separate category of emergency, and therefore by its nature cannot be addressed by the crime paradigm, is much less compelling. As we've seen, for Ackerman the distinguishing characteristic of an emergency has nothing to do with an existential threat to the state or constitutional order, so in fact falls outside the events contemplated by most existing constitutional emergency provisions.⁸⁸ Why not simply treat terrorism as a crime? After all, if the crime paradigm was regarded as sturdy enough that domestic communism at the height of the cold war, as well as mafia organizations at their most powerful, were both treated as *criminal* conspiracies. Why should terrorism be an exception?

This question, which Ackerman anticipates in his response, can be reformulated as the question posed at the beginning of this chapter: what are the criteria by which Ackerman proposes to distinguish the condition of emergency from the give and take of ordinary politics? What makes terrorism the former and not the latter? What distinguishes terrorism from crime and qualifies it as an emergency is its irreducibly *public* and *political* character, in that it involves a

⁸⁷ Ibid., 35-8.

⁸⁸ i.e. France, Germany, etc.

challenge to what he calls “effective sovereignty.” For Ackerman, this is what fundamentally places a terrorist attack outside the purview of criminal law and constitutes an emergency exception from ordinary politics. Unlike even the most formidable criminal organization, the basic purpose of even a small-scale terrorist attack is “to destabilize a foundational relationship between ordinary citizens and the modern state: the expectation of *effective sovereignty*.” In other words, whereas terrorism does *not* present an existential threat to the state or the political community, it *does* present a direct and public threat to the public *perception* of the state’s ability “to maintain control over the basic security situation.”⁸⁹

Consistently with his earlier arguments, Ackerman emphasizes that effective sovereignty does *not* refer to the state’s physical control over the territory, or the capacity of state institutions to function within its borders. Rather, the emphases on public *expectation* and *appearance* are crucial to the definition – what is at stake in a terrorist attack is the public perception of widespread insecurity and a crisis of the state’s legitimacy that is grounded in its ability to maintain an expected measure of security and regularity.⁹⁰ Ackerman identifies the central imperative of emergency powers as what he calls “the reassurance interest.”⁹¹ Thus, unlike the model of emergency powers designed for an existential threat such as a war or invasion, the emergency means in Ackerman’s sense are aimed at calming domestic opinion and public reassurance as much as they are aimed at overcoming a physical danger or threat. “The proclamation of an emergency publicly recognizes that the terrorist assault on effective sovereignty strikes at a fundamental aspect of the social contract, and seeks to reassure the public that aggressive action will be taken to contain the crisis.”⁹²

⁸⁹ *Before the Next Attack*, 42.

⁹⁰ *Ibid.*, 55-6.

⁹¹ *Ibid.*, 44.

⁹² *Ibid.*, 45.

To see some of the major problems with this argument, let's begin by looking more closely at the way Ackerman draws boundaries around the paradigm of criminal justice. Concerning the former, he points out that although a Mafia organization may be many times larger, more powerful and more deadly than a terrorist group, the aims of the former are limited to its own economic gain, and has no interest in openly and publically challenging the legitimacy of the political order.⁹³ For this reason, Ackerman claims that even a small terrorist attack by a marginal group without support would still threaten effective sovereignty whereas even large scale organized crime on a much more deadly scale does not. But it's not clear why this must be true as a general rule. For instance, the exceptionally high levels of violence between the state and drug trafficking syndicates in Mexico appear to be seen by the Mexican public as a crisis of an unmistakably public, political character, and clearly seems to have constituted a fundamental challenge to the legitimacy of the Mexican state for some time. Indeed, the Mexican example would seem to be a much more paradigmatic case of Ackerman's idea of effective sovereignty challenged than sporadic terrorist attacks in North American and Europe.⁹⁴ This is the case despite the fact that the syndicates have no political ambitions that are not instrumental to their ability to make money.

Conversely, it is clearly false that all terrorist attacks, even minor or ineffective ones, necessarily challenge effective sovereignty. The 1995 bombing in Oklahoma City, for instance, was by any standard a very serious and horrifying terroristic attack, but is there any evidence that it caused a fundamental precondition of criminal justice – public faith that “the government was really in control of its affairs within the nations borders”⁹⁵ – to collapse? It isn't clear either that

⁹³ “Whatever else is happening in Palermo, the mayor's office is occupied by the legally authorized representative of the Italian Republic,” *Ibid.*, 41.

⁹⁴ For a journalistic example, see, Finnegan, W. (2010). Silver or Lead. *The New Yorker*.

⁹⁵ *Before the Next Attack*, 42

the al-Qaida bombings in London and Madrid struck such a heavy blow to British and Spanish effective sovereignty so as to render their criminal justice paradigms inoperative. Indeed, the only example of a North American or European terrorist attack in recent memory in which Ackerman's account is even arguable is the case he clearly has in mind, of September 11, 2001. Whether or not the idea of effectively sovereignty is an effective way of interpreting the impact of those attacks, there's no question the immediate aftermath of 9/11 produced a very high, certainly for many people an unprecedented, level of public fear and insecurity. And yet, even though this ought to be the paradigmatic example of how shattered effective sovereignty rendered the possibility of employing criminal justice impossible, what actually occurred is much more complex. Even in the midst of ubiquitous war-talk and the Bush administration's revival of military tribunals and worse in the years immediately following 2001, several prominent and visible criminal trials related to the attacks also occurred in that period, most notably the trial of Zacharias Moussaoui. Once again, while the level of public anxiety and its causes in this period can be debated, it's not true that the blow to effective sovereignty rendered the paradigm of criminal justice unavailable for 9/11 related crimes. Despite the Bush administration's decision to eschew the crime model as a response to terrorism, criminal trials such as the Moussaoui trial still occurred successfully. Of course it would be possible to argue that the trial should not have taken place and the difficulties it encountered only prove the potentially damaging effect trials like this have on the justice system. This argument was made often by critics of the trial, while some of its defenders countered by pointing out that Moussaoui's criminal conviction in civilian court inspired confidence and security in ordinary political institutions rather than the opposite.⁹⁶ The fact that there was a large public debate

⁹⁶ see for instance, Kendal Coffey, "The Case for Military Tribunals," *Wall Street Journal*, May 26 2003, http://kendallcoffey.com/pdfs/publications/Case_for_Military_Tribunals.pdf and Jonathan Hafetz, "What the

about such trials, with broad disagreement on both sides, might itself cast some doubt on the idea of threatened effective sovereignty, which would seem imply a sense of insecurity so radical and pervasive that it would create a fairly broad consensus. We might consider a widespread public debate about whether or not effective sovereignty has collapsed as evidence that it has not.

The other example of criminal justice that Ackerman wants to distinguish from terrorism is the Cold War allegations of a domestic communist conspiracy. These did obviously have a political character, but according to Ackerman never cast effective sovereignty into question either. The reason is that during the Cold War “the danger remained abstract to ordinary people,” and was never concretized or dramatized in an event that made the perception of insecurity vivid and palpable to the broader public.⁹⁷ Unlike the innumerable quotidian risks with which we reckon daily, terrorism is “qualitatively different from many of the other uncertainties of life” and uniquely triggers “fundamental doubts about our collective capacity to maintain the fabric of public order.”⁹⁸ Once again, there is very little evidence for this categorical assertion about the unique status of terrorism. It’s not easy to know how to objectively compare the public fear of one era to another, and Ackerman does not attempt an explanation.⁹⁹ One of these that seems particularly implausible is the claim that fear of terrorism post-9/11 is much more vivid and concrete to ordinary people than was fear of communism or nuclear war during the Cold War. With the exception of a tiny sliver of the population that had some direct, immediate experience of these phenomena, surely the average American’s fear of terrorism is every bit as abstract and mediated as the Cold War fears. In all three cases the object of fear was accessible only through

Moussaoui Verdict Teaches Us,” at <http://jurist.law.pitt.edu/forumy/2006/05/what-moussaoui-verdict-teaches-us.php>

⁹⁷ *Before the Next Attack*, 42.

⁹⁸ *Ibid.*, 45.

⁹⁹ See for example Corey Robin, *Fear: the History of a Political Idea*, chapters 6, 7.

the media, popular culture and the like, and all three at various moments became a means through which public officials attempted to mobilize political coalitions, contributing to an atmosphere of widespread disinformation. Finally, Ackerman distinguishes the unrealized Cold War nightmares of the past with the terrorist attacks of the future, which “will almost certainly recur at unpredictable intervals, each shattering anew the ordinary citizens’ confidence in the government’s capacity to fend off catastrophic breaches of national security.” The confident near-certainty of this prediction, of course, does not alter the fact that it is sheer speculation. Ackerman’s treatment of previous conspiracy cases together with his future predictions amount to an astonishing sleigh of hand, dismissing numerous historical examples in which criminal justice has been an effective response to large-scale political and criminal conspiracies, and at the same time treating unsupported speculation about the future as an indubitable certainty.¹⁰⁰

The priority of order argument, from self-preservation to security

Leaving to the side for now these objections about the classification of terrorism, I want to turn to Ackerman’s argument for why the crime paradigm *must* be set aside. Assuming for the moment that terrorism uniquely inspires fear and insecurity, why does that mean that the criminal justice paradigm is *inapplicable* as a matter of principle to terrorism? I want to look carefully at the use Ackerman makes of the concept of effective sovereignty to invoke a kind of existential logic of necessary priority, and extend that same reasoning about self-preservation in order to apply to the case of public insecurity. As we’ve seen, the logic of an existential threat justified violating a law in order to preserve the legal order from destruction, since the condition of possibility of that or any other law is the existence of the legal order. Even though Ackerman

¹⁰⁰ Ibid., 182-3.

has explicitly rejected the claim that self-preservation has anything to do with effective sovereignty, he nevertheless adopts exactly the same argument for the priority of order over legality and reapplies it to the case of security. Now the claim is that the public perception of security (i.e. effective sovereignty) is an essential precondition for procedural trial rights, and therefore these rights may be suspended in order to restore the public perception of security: “the normal operation of the criminal law *presupposes* the effective sovereignty of the state, but a major terrorist attack *challenges* it. Before it can operate a criminal justice system, the state must first assure its effective sovereignty.”¹⁰¹ Ackerman’s repeated references to the *priority* of effective sovereignty over criminal justice have a double significance: priority implies both the *temporal* priority of restoring effective sovereignty first and criminal justice second, and also the priority of *value* or importance of effective sovereignty as a necessary presupposition that must be in place for criminal justice to be possible.¹⁰²

Thus, Ackerman’s necessary presupposition argument and his reference to “the *expectation* of effective sovereignty which serves as the premise of social order” appear to reproduce the logic of self-preservation, only now within the realm of reassurance and public perception rather than that of existential threats.¹⁰³ Importing the logic of self-preservation into the realm of security allows Ackerman to present the priority of the “reassurance function” over criminal justice as if it were a logical necessity analogous to the physical integrity of the state rather than, primarily, a means of reassuring a frightened public. Thus, without providing further specification or evidence, Ackerman writes that the model of criminal law “has proved itself adequate when dealing with dangerous conspiracies, but only within a social context that

¹⁰¹ *Before the Next Attack*, 43.

¹⁰² In addition to the quote above: “the criminal law is itself based on premises [i.e. effective sovereignty] that fundamentally limit its operation,” 39. And again, “the criminal law treats individual cases *as if the larger question of effective sovereignty has already been resolved*.” (Ackerman’s italics), *Ibid.*, 44.

¹⁰³ *Ibid.*, 46

presupposes the government's effective sovereignty."¹⁰⁴ And since effective sovereignty has been defined as the condition that is undermined by a terrorist attack, the charge of terrorism is a priori excluded from the paradigm of criminal justice, and categorically placed in an emergency paradigm whose first response is to target groups or collectivities rather than individuals for detention.

The concern with false positives and requiring proof of "the culpability of individual suspects at the time of their alleged offense." Instead, by definition the charge of terrorism triggers the concern with false negatives that derives from the war paradigm, and is associated with a model of *collective guilt and collective punishment*. Ackerman clearly does not intend to provide anything like a veiled justification for cynically mollifying popular anger by targeting a group of people for collective retribution or punishment. Nevertheless, his uncritical fusion of security with the logic of self-preservation and his postulation of state "reassurance" as a necessary precondition for criminal justice risk undermining the very liberal principles that motivate Ackerman's intervention in the first place.

The politics of security

A possible reason Ackerman keeps veering off course in this discussion has to do with some difficulties inherent in the concept of security itself.¹⁰⁵ On the one hand, I've been pointing out that for Ackerman the idea of effective sovereignty does not imply some kind of objective indicator of social order, but rather primarily has to do with the public perception of the state's ability to maintain order, the appearance of political control over territories, etc. On the other hand, his discussion more frequently treats security as if it were a straightforwardly objective

¹⁰⁴ Ibid., 44.

¹⁰⁵ Ibid., 42.

quantity, which can be measured or calculated independently of the way it is perceived or experienced. It is worth pointing out, however, just how radically different the two views may be. For instance, Ackerman is surely right that most people find certain ways of dying more frightening than others. He's probably right, also, that our society tends to view the prospect of violent death at the hands of a politically motivated killer more frightening than, say, the prospect of dying from disease or accident (although it is an interesting and very difficult question why this should be so).¹⁰⁶ If this is true, it already indicates that security cannot be a matter of mere statistical probability of death or bodily injury. Even in the exceptional year of 2001, in the United States only 1 in 750 deaths was due to terrorism, which is about 0.13% of all deaths. Other years, obviously, the numbers were much lower.¹⁰⁷ One dimension of the subjective (or one could as easily say, social) character of security, then, is that it is determined to a very considerable extent by the significance or meaning that certain kind of bodily harm or death have for us, in a way that can be quite independent of even a dim knowledge of statistical probability or likelihood.¹⁰⁸ Another subjective aspect of security is that it is a reflexive condition rather than a simple state that mirrors something outside. So, for example, the level of someone's fear of being attacked does not simply rise and fall in accordance with a statistical barometer of the probability of being mugged. Rather, the level of fear I experience is as much *constitutive of* my insecurity as it is a reflection of it.¹⁰⁹ That's why it feels appropriate to place scare quotes around the idea of calculating an "objective" level of security – not because there cannot be in principle an objective calculation but because such calculations determine only a part of what it means to

¹⁰⁶ Waldron, J. (2011). "Safety and Security." *Nebraska Law Review* 85(2). and Pogge, T. (2008). "Making War on Terrorists - Reflections on Harming the Innocent." *Journal of Political Philosophy* 16(1): 1-25.

¹⁰⁷ this date was cited in Thomas Pogge, "Reflections on Killing the Innocent"

¹⁰⁸ I leave to the side here the much more difficult question of why this might be so, or whether it is rational or irrational.

¹⁰⁹ Waldron, "Safety and Security"; R.B.J. Walker, "The Subject of Security" in Krause, K. and M. C. Williams (1997). *Critical security studies : concepts and cases*. Minneapolis, University of Minnesota Press.

feel secure or insecure. A third subjective aspect has to do with the sense in which “being secure” means something much more than having the knowledge that one happens to be out of danger at that particular moment in time. It includes the sense of being *sure*, having some *certainty* of one’s safety rather than simply discovering that it turned out that way. It also seems to include the ability to make dependable assumptions and orient one’s action in the future rather than knowledge of a particular moment in time.¹¹⁰

All of these help explain the powerful and unstable ways in which security can greatly magnify certain kinds of risks and diminish or ignore others. This makes it difficult to use the concept of security to pin down to certain thresholds, as in the idea of effective sovereignty, which are then supposed to correspond categorically to one specific form of unlawful violence, but not others. Alongside these ‘subjective’ characteristics we can mention here the obviously political potential of security as a speech act, a way of framing not only particular events but also potentially a more general character of political and social life. Security in this sense is a political style and mode of rhetoric that works in nearly identical ways as the presidential “war talk” criticized by Ackerman: a means of mobilizing support or strengthening a coalition by emphasizing collectivity and struggle, announcing that ‘we’ face a security risk that calls for immediate, decisive measures, elevating an issue above the ordinary political fray, etc. Secondly, we saw that the subjective qualities of security make it difficult to translate into as a finite, determinate quantity in general. Along with the presence of security in rhetoric and political culture, its non-determinate qualities can have the political implication of security as the basis of a limitless demand. For a political discourse focused on security as an unqualified political good, every remaining form of insecurity will appear as an unqualified evil, and the more insecurity is

¹¹⁰ Here I am following Jeremy Waldron’s very insightful discussion in “Waldron, J. (2011). “Safety and Security.” *Nebraska Law Review* 85(2), 309.

eliminated, the more intolerable the potential for insecurity will be. A politics of security as an unqualified good does not simply imply “the more security the better.” It implies, effectively, that “the more security we have, the more security we need.”

The criticisms I have been making of Ackerman’s proposal can be summarized in terms of the basic thesis of this chapter: an effective response to the expansion and normalization of emergency powers must engage both the level of institutions and the level of discourse. *Before the Next Attack* is an invaluable contribution to the discussion of emergency institutions, and remains the most sophisticated proposal in the recent literature. While some critics have sought to identify Ackerman’s “blind spot” in constitutional or procedural terms,¹¹¹ I’ve argued that the problem is elsewhere – his uncritical identification of insecurity with an emergency. Underlying this identification, which uncritically reflects some of the same pathologies of emergency politics that Ackerman seeks to prevent, is a deeper sense of crisis in the way that democratic representation and the separation of powers have evolved in 20th century US politics. Ackerman has a keen and sophisticated understanding of the shift in the locus of democratic representation from the legislature to the executive, and the corresponding diminution of Congress’ sense of its own institutional integrity and prerogatives as the center of gravity of the political system shifted toward the presidency. While in earlier works Ackerman was optimistic about the democratic potentials of this shift, more recent works have explored the darker side of plebiscitarian politics.¹¹²

¹¹¹ e.g. David Cole, “Priority of Morality”; Krause, K. and M. C. Williams (1997). *Critical security studies : concepts and cases*. Minneapolis, University of Minnesota Press., Gudridge, L. T. a. P. (2004). “The Anti-Emergency Constitution.” *Yale Law Journal* **113**(8).

¹¹² Indeed, each of his last three books have been more pessimistic about presidentialist democracy than the previous one. Ackerman first explored the negative potentials of plebiscitarianism in Ackerman, B. A. and ebrary Inc. (2005). *The failure of the founding fathers Jefferson, Marshall, and the rise of presidential democracy*. Cambridge, MA, Belknap Press of Harvard University Press., which focused on the 1802 election and immediate aftermath only. Next came *Before the Next Attack*, with its grim diagnosis of executive manipulation of emergencies for its own ends,

The important point in this context is that this underlying concern about the growth of presidentialist democracy is first and foremost a product of *ordinary* politics, a product of long-term trends and entrenched cycles that help shape the dynamics of political normalcy and periods emergency alike.¹¹³ In a response to his critics published in the *Yale Law Journal*, Ackerman clarifies this underlying motivation to address pathologies in the ordinary secular trends of presidentialism.¹¹⁴ Here Ackerman shifts his focus from the attempt to classify terrorism under the category of emergency rather than crime to the rhetorical strategies and incentives that push presidents to rely upon and extend the rhetoric of war as broadly as possible: “The Cold War. The War on Poverty. The War on Crime. The War on Drugs. The War on Terrorism... There is something about the presidency that loves war-talk.”¹¹⁵ Noting the powerful incentives presidents have to invoke the war paradigm, Ackerman explains that his goal is to “provide a new framework for controlling this presidential dynamic in its present [2004] boom cycle,” and to prevent “the rhetorical slide to war by creating a new framework... this is not a war but a *state of emergency*.”¹¹⁶ Confronting his critics, he summarizes their response and asks us to imagine it coming from a president in response to a terrorist attack: acknowledging that an absolute elimination of the possibility of future attacks is unrealistic, that in the long term the United States must address the root causes of rage and resentment in the Arab world, and that we must not violate our basic constitutional commitments in a futile pursuit of the illusion of total security. Ackerman calls this the strategy of “legalistic tough talk, and concludes that “while it

followed by the recently published *Crisis of the Republic*, which lays out an even grimmer scenario of the threat of plebiscitarianism to basic liberal democratic institutions.

¹¹³ Skowronek, S. (1997). *The politics presidents make : leadership from John Adams to Bill Clinton*. Cambridge, Mass., The Belknap Press of Harvard University Press

¹¹⁴ Ackerman, B. (2004). "This is Not a War." *Yale Law Journal* 113(8), 113.

¹¹⁵ Ibid, 1871-2

¹¹⁶ *ibid*, 1872, 1873.

has substantial merit, how likely is it that future presidents will actually take this path?”¹¹⁷ This is an entirely different argument than the one about the inherent qualities of terrorism that make it inappropriate for the criminal justice paradigm. Moreover, the they even seem contradictory: here, Ackerman appears to acknowledge that terrorism may not *actually* be an emergency – the business as usual response has “substantial merit – but the objective status of terrorism is beside the point, since the aim of the emergency framework is to intervene in the cycle of plebiscitarian politics, placing new barriers to presidential war-talk by inserting the intermediary category of emergency, and triggering a reoccurring authorization requirement by escalating supermajorities – in other words, jolting congress back to life and stiffening its spine with external reinforcements until it reverses its retreat and begins recovering its institutional prerogatives from the executive.

This is an excellent framework for temporary emergency powers that maintain accountability and preserving a role for the separation of powers *during a genuine emergency*. The attempt to substitute inflated presidential war talk with *legal emergency powers*, however, is a misguided strategy that may well backfire. If plebiscitarianism and the expansion of the war paradigm to describe nearly any political initiative (poverty, crime, drugs, terror, etc.) are both the product of long-term trends and cyclical pathologies of *ordinary* politics, they should be diagnosed and confronted as such rather than repackaged as problems stemming from temporary emergencies such as terrorism. Such a solution, as I’ve argued, is just as likely to perpetuate the problem since it derives the definition of emergency from the cyclical moment of plebiscitarian expansion, “war talk” and executive unilateralism that it seeks to combat. In other words, if the rhetoric of war can be successfully extended to X, then the framework of emergency powers can

¹¹⁷ Ibid, 1876

be a plausible alternative to war only by insisting that “X” is not really war but an emergency. A war on drugs could be disrupted by insisting that drugs are neither crime nor war but an emergency.

The reflexive model of dualist emergency powers

While Ackerman’s proposal contains several institutionally promising characteristics, his underlying conception of what constitutes an emergency perpetuates rather than amends some of the most troubling characteristics of recent security politics. His redefinition of an emergency around an expansive conception of security reproduces a central feature of the war on terror whose excesses he opposes: the elevation of security and public reassurance into a political goal and justification for state power that trumps all others, and the erosion of the fundamental liberal constitutionalist separation between war and crime. While Ackerman’s emergency constitution would constrain presidents within institutional limitations, the drastic expansion of the meaning of emergency could contribute to the fusion of emergency powers into ordinary aspects of governance. Dualist institutional designs should aim at separating the norm and the exception; Ackerman unintentionally replicates some of the post-9/11 blurring of these two categories.

Fortunately, some of the major institutional characteristics of Ackerman’s model point the way forward. If unacknowledged and unexamined assumptions about security drive the expansion and entrenchment of emergency powers, then a fundamental desideratum of emergency institutions should be to encourage and precipitate public reflection and debate on those assumptions. They should encourage, in other words, reflexivity rather than unexamined realism concerning the question of what constitutes an emergency. If Ackerman’s realist assumptions about security, terrorism and emergency impede this reflexivity, other features of

his institutional model nevertheless could be excellent devices for encouraging it. In particular, the idea of the supermajoritarian escalator, which lies at the core of his proposal, exemplifies the potential for institutions to promote and sustain reflexivity, triggering critical public deliberation at key moments, and sheltering it against countervailing tendencies of executive unilateralism and entrenched prerogatives. By forcing the executive to periodically return to Congress and make an explicit public case of the necessity of renewing emergency measures, the escalator could help focus debate on the meaning and viability of the claims to necessity, exposing these claims to public scrutiny. Even more importantly, by framing the process in terms of the separation of powers and the interaction of public representations, the procedure imposes a *public* character on the justifications, shifting away from the secrecy- and expertise-based discourses of national security bureaucracies and into the light of day of the public sphere. Only in this realm of a critically engaged, deliberative public can reflexivity take place. Third, the increased supermajority burden required by the escalating authorizations works, as Ackerman points out, to provide political cover to minority parties and civil libertarians, forcing the executive to speak to the largest coalition possible and therefore address and take seriously minoritarian views.¹¹⁸ Each of these three aspects are crucial for encouraging and sustaining the reflexivity required to prevent entrenchment of emergency prerogatives and the normalization of emergency powers.

Ultimately, dualist theorists are justified in dismissing the critique of Schmittian exceptionalists that the “exception,” by its very nature, cannot be contained or anticipated by legal procedures. This critique, as Andrew Arato points out, conflates procedure and substance: this or that emergency may well be unforeseeable in terms of substance, but the legal procedures and

¹¹⁸ Ackerman, *Before the Next Attack*, 81-3.

forms of authorization for emergency powers can, in spite of this, very well be established in advance.¹¹⁹

The flipside of this dualist procedural argument, which seems to follow logically from Arato's point, is that if procedures in this context are substance neutral, then we must also acknowledge that procedures are powerless to objectively fix the meaning of an emergency in a way that prevents the possibility of abuse. The task of making judgments about the meaning and scope of emergencies, the content of basic rights, and the legitimacy of the state's "reassurance" activities cannot be secured by institutions alone; it is a role that can only be played by a critical and vigilant public sphere. Well-designed institutions such as Ackerman's super majoritarian escalator can help to open and preserve a space for reflexivity and the public sphere, but they cannot replace it.

Thus, apart from its prominence in the current literature, Ackerman's proposal is especially interesting and merits sustained attention for three major reasons. First, because it presents the most sophisticated and creative example of dualist institutional design in the US context. Indeed, apart from its other merits, I've argued here that Ackerman's proposal is an excellent example of how institutional procedures can promote and enhance the desiderata of publicity and reflexivity in emergency judgments. Secondly, and conversely, Ackerman provides a striking example of how even the most sophisticated and refined institutional design cannot be immune to counterproductive outcomes if it uncritically adopts and fails to reflect upon the underlying conception of what constitutes an emergency in the first place. Third, this combination of sophisticated institutional design together with a set of problematic assumptions concerning security and emergencies illuminates the problems and shortcomings of the realist

¹¹⁹ Arato, "The Bush Tribunals," 470. Rousseau, effectively, made a similar point when he stated in reference to the dictatorship that it is a crucial part of foresight to foresee that one cannot foresee everything.

approach to emergency powers. I defined realist at the outset of this chapter as the view that identifying an emergency is simply a matter of correctly recognizing an external, factual state of affairs. As I've argued, however, the view that the categories of "crime," "war," and "emergency" objectively correspond to certain kinds of activity such that we can definitely say, as Ackerman wants to do, that terrorism is by definition *not* crime, is both intellectually futile and politically constraining.

Chapter II: Arenas of Emergency Politics: Reason of State, Representation and Security

The guiding questions of this dissertation are: how are quotidian political events distinguished from emergencies? What is the vision of political “normalcy” in reference to which a state of exception can be declared, and the legitimate ends of exceptional, emergency powers can be identified? What is the role of these background conceptions in shaping the political outcomes associated with emergency powers? In the introduction I argued that these questions push beyond the two predominant approaches in the contemporary literature: the first was the “naïve realist” view that emergencies have a self-evident, objective character, and identifying an event as an “emergency” is a straightforward matter of accurate perception. The second was the decisionist or “deconstructive” view, which argues that emergencies can never be identified as a factual state of affairs, but rather are defined as the result of a valid legal procedure for declaring a state of emergency, or by a sovereign decision on the exception. Neither of these approaches, I argued, can provide us with an adequate account of the *politics* of emergencies, by which I mean the contested arena of political judgments about the nature of a given threat, and identity and value of what is to be preserved.

We saw, for example, how despite the inconsistencies in Carl Schmitt’s different accounts of emergency powers, they all can be read as shifting attempts to intervene in the same underlying crisis of the classic European sovereign state. Seen from this perspective, Schmitt’s favored mode of expressing his core ideas in stark antitheses – commissarial versus sovereign dictatorship, decision on the exception versus legal normativity, friends versus enemies, democratic identity versus parliamentary discussion, etc. – are designed to reveal and vivify the fundamental fault lines and antinomies underlying the pluralist *Rechtsstaat*. Each of these antitheses attempts to cut through what he saw as the heterogeneous accommodations and ambivalences of the liberal democratic state, and locate the precise junctures where coexisting

antagonisms have intensified into a point of total opposition and fundamental decision. Each of these antitheses, in other words, presses toward a moment where the state can be revealed as an autonomous actor, distinguishing itself from all other social spheres and groupings and identifying on its own terms the enemies threatening its existence.

This chapter sketches an alternative account of the modern state as a source of emergency politics. Whereas Schmitt's explored the exception as a medium for dissolving political contention and judgment in the moment of absolute decision, I shall focus on three internal tensions within the concept of the modern state, each of which establishes an arena of emergency powers. Hence, in response to Schmitt's hopes that the exception would jolt the state into regaining the qualities of homogeneity and concrete unity, my aim is to emphasize the "essentially contested" quality of emergencies as political judgments, drawing from the terms of ordinary as well as exceptional moments of political life. Rather than present a single definition, I approach "the state" as a palimpsest, a text composed of layers of writing inscribed upon one another. The task of interpreting a palimpsest is not to arrive at a single, self-consistent, uniform meaning but to preserve the multiplicity of the layers composing the whole. Palimpsest interpretation is the delicate art of applying various solvents or exegetical techniques in order to illuminate earlier, more fragmented and obscure textual layers without destroying the legibility of the surface.¹²⁰ Fortunately, we can benefit from an important body of scholarship in renaissance and early-modern political thought that has focused on exactly these ongoing redefinitions and multiple layers of meaning embedded in our political lexicon.¹²¹ Building on

¹²⁰ I take this image from Viroli, M. (1992). *From politics to reason of state : the acquisition and transformation of the language of politics, 1250-1600*. Cambridge ; New York, Cambridge University Press.

¹²¹ Specifically, I am indebted here to Skinner, Q. (1998). *The foundations of modern political thought*. Cambridge, Eng. ; New York, N.Y. ; Melbourne, Australia, MelCambridge University Press.; Pocock, J. G. A. and ebrary Inc. (1975). *The Machiavellian moment Florentine political thought and the Atlantic republican tradition*. [Princeton,

this literature, I shall analyze three examples of how these multiple layers of meaning persist in the form of three broad “tensions” embedded in the concept of the modern state: first, self-preservation and collective freedom, second, representation and political unity, and third, individual security. Each of these tensions gives rise to a specific ‘arena’ of the politics of emergencies, in the sense that it determines how an emergency is identified, and defines the identity and value of what is being preserved. Moreover, at the same time it also provides the terms for contesting and criticizing these designations. These three themes are meant to be illustrative rather than exhaustive. I do not want to suggest that every political emergency can be reduced to the three themes I focus on here. At the same time, within each these examples we can detect a pattern of how emergencies are declared and debated that recur persistently, assuming different forms in different contexts, and continue to shape emergency politics in the present.

The reason for turning to these historical sketches follows directly from my argument that theories of emergency powers must be broadened to include the conceptual background and political construction of emergencies. In this chapter, I want to give substance to this idea by looking at the examples of *self-preservation*, *political unity*, and *security* as internal tensions in the modern state. The first example refers to the state as a means of defending collective liberty against its enemies; the second, to the state as the expression of the political unity of a people; and the third, to state as a guarantor of individual security. I have stated that the tension constituting each of these arenas is *internal* to the conceptual underpinnings of the modern state. By “internal” I mean, first, that each tension marks a persistent continuity within the concept the state, from which we can trace a pattern across different iterations and permutations as times and

N.J.], Princeton University Press: xii, 618 p. and Viroli, M. (1992). From politics to reason of state : the acquisition and transformation of the language of politics, 1250-1600. Cambridge ; New York, Cambridge University Press.

contexts change. Although it is of course not inconceivable that the meaning of “the state” may evolve at some point so that these tensions are no longer important or relevant characteristics, I claim that the tensions discussed here mark broad continuities between the early modern period and the present, although of course we can identify significant change alongside this continuity. Secondly, “internal tension” points to the way in which the meaning of “the state” encompasses both a particular principle of legitimacy, and at the same time the critique of that principle. In other words, the tensions are internal because they involve principles that justify *both* the use of emergency powers as a legitimate act to preserve the state *and* the criticism of emergency powers as an illegitimate form of state power.

In other words, the terminology of tension suggests contestation, in which justification and critique are continually in play. Rather than a theoretical contradiction that can be resolved with finality, I use the terminology of “tension” and “arena” to suggest a *productive* tension that demonstrates the essentially contested and irreducibly political nature of the definition of an emergency. These arenas are neither static nor reconfigured at different periods whole-clothed. Rather, at least in the case of the three tensions analyzed here, they form broad thematic continuities across time, within which ideological innovation and changing responses to new contexts can be identified. Thus, at a synoptic level we can identify continuity in normative structures, rhetorical themes and conceptual patterns that recur, even as they are impacted and transformed by changing political circumstances, up to our own present. Finally, while I describe these arenas separately for analytical and heuristic reasons, they are of course not hermetically sealed but continually interact, condition on another and overlap in real life.

In each of these three examples, I will single out various attempts to deny, eliminate or ultimately resolve these tensions and show how these attempts rest on a unsuccessful

depoliticizing strategy of permanently removing a strand of the state from the domain of political contestation and revision. In contrast to these strategies, I suggest that a better task for political theory would be to emphasize the irreducibly political and contested character of particular instances of emergency powers by unearthing their conceptual assumptions, rhetorical strategies and normative justifications to critical scrutiny.

I. Preserving a Free State: collective liberty and *raison d'état*

Però, come di sopra si dice, viene ad avere, lo stato libero e che di nuovo surge, partigiani inimici, e non partigiani amici ... E chi prende a governare una moltitudine, o per via di libertà o per via di principato, e non si assicura di coloro che a quell'ordine nuovo sono inimici, fa uno stato di poca vita.¹²²

-- Machiavelli, *Discorsi*, I.16

“Is there in all republics this inherent and fatal weakness? Must a government of necessity be too *strong* for the liberties of its people, or too *weak* to maintain its own existence?”¹²³ This question, posed by Abraham Lincoln in the first weeks of the Civil War, is quoted by Clinton Rossiter in the opening of his classic study of emergency powers, *Constitutional Dictatorship*. It neatly encapsulates a tension in the modern republican state and a core symbolic arena of conceptions of emergency powers and the republican institution of dictatorship in particular: the tension between collective liberty and *raison d'état*. I refer to this as a tension, because it is not just a matter of two independent, conflicting principles (liberty versus strong government) but two internally related principles, justified by reference to the other, and at the same time carry the potential to undermine one another other. The justification of a strong government is to protect

¹²² I.16 [154-5]

¹²³ Rossiter, *Constitutional Dictatorship*, 3. The quotation is from Lincoln, message to special session of Congress, July 4, 1861.

liberty; weakening government in the name of liberty may endanger liberty itself, and at the same time strong government threatens liberty. As Rossiter describes it, constitutional dictatorship “is an inevitable and dangerous thing, and must be thoroughly understood and controlled by any free people who are compelled to resort to it in defense of their freedom.”¹²⁴ In this section, I first focus on Machiavelli to illustrate how the tension between collective liberty and *raison d'état* is embedded in the emergence of the modern conception of the state in the late renaissance. I next sketch the way it has functioned as a symbolic arena for the development of competing theories of dictatorship and internal emergency powers. Finally, I point to some examples where the same tension arises at the boundary between domestic politics and foreign affairs.

Renaissance Origins: Politics and the Art of Statecraft

The renaissance origins of the modern state reflect two contradictory poles: on the one hand, the state or “status” of republican liberty referred to the structure of collective virtue making possible self-rule and a free way of life. On the other hand, “reason of state” referred to the state as the site of a new kind of instrumental “reason” defined by the coordinates of power and strategy. The former was civic, intrinsically normative and referred to collective liberty; the latter was non-civic, normatively skeptical, and referred to the autonomy of the prince as a solitary actor. The name that has come to stand for this dualism, of course, is Machiavelli. The Florentine’s dual status as an intensely committed proponent of republican liberty and a theorist of reason of state constituted an interpretative controversy that has persisted up to this day, namely: how to synthesize the republican partisan and the advisor to princes?

¹²⁴ Ibid., 13.

In one of the most important recent contributions to resolving this puzzle, Maurizio Viroli acknowledged Machiavelli's importance as an innovator of *raison d'état*, while at the same time defending his position within the classic neo-Roman tradition of civic republicanism. For Viroli, the key to the puzzle I mentioned above lies in semantics. The subject matter of the *The Prince* concerns the means by which a new prince can hold his state and overcome his enemies in order to consolidate and enlarge his power. Famously, these means include those rejected as immoral by the Christian and humanist tradition. In other words, *The Prince* is concerned with *l'arte dello stato* – the art of preserving and strengthening the ruler's state, in which the key criteria are power and self-preservation rather than moral righteousness, justice or form of government. However, Viroli places great emphasis on the fact that Machiavelli never uses the word *politico* or its equivalents in that work.¹²⁵ When Machiavelli refers to *politics* in his republican writings, it is clear that he does not have in mind the strategic art of statecraft separated from morality. Politics, Viroli points out, for Machiavelli still referred to the “classic” meaning of the term within the Ciceronian republican tradition. Politics “*only* meant the art of good government and, more generally, the art of *preserving* a city – understood as a community of individuals living together in justice.”¹²⁶ By sharply distinguishing between the civic normative structure of politics and the strategic and instrumental structure of reason of state, Viroli's interpretation acknowledges Machiavelli's contribution to the latter while still claiming Machiavelli as a theorist of republican *politics* for the neo-Roman, Ciceronian tradition that rejected the instrumental world of reason of state.

Viroli's solution of separation and bifurcation, however, fails to capture one of Machiavelli's most important and challenging themes: his repeated insistence on the inextricable

¹²⁵ *From Politics to Reason of State*, 486

¹²⁶ *Ibid.*, 475-6.

and internal relationship between *raison d'état* and the civic normative structure of *republican politics itself*.¹²⁷ In order to see this relationship, and its deep resonances throughout the modern republican tradition, we have to relocate Viroli's politics/reason of state contrast within the distinctively secular temporal and spatial orders of the modern state as an institutional agent standing apart from the society it governs.¹²⁸ In this section, I use the common framework of the state to explore the tensions and interrelations between politics as *both* an instrumental "economy of violence" *and* as participation in rule among civic equals by linking both sides more closely with the idea of the state. The simple contrast between politics and statecraft, or (in more recent terms) Arendtian vs. Weberian conceptions of the political as separate and independent fails to capture the multiple, tense and dynamic interrelations between the two conceptions as they co-exist in the history of the idea of the state. This section briefly sketches the origins of this tension in the state and references some moments in its subsequent history as one important arena for understanding emergency powers.

Historians of republican political thought have shown that, in its classical and early renaissance variants, civic republicanism had no clear concept of an apparatus of political rule that existed independently from the social class or personal ruler who occupied those institutions.¹²⁹ Machiavelli provides a striking example of the origins of this new way of thinking about the state. At several points in *The Prince*, Machiavelli at times breaks with the pattern of

¹²⁷ Indeed, Machiavelli's claim about the interrelations between reason of state and republican politics seem to be what distinguish him from his classical sources; the distinction Viroli draws in Machiavelli seems to reflect a clear contrast in Cicero himself between justice within the republic and *utilitas* in relation to rival communities. See for instance, Cicero, M. T., M. T. Griffin, et al. (1991). *On duties*. Cambridge England ; New York, Cambridge University Press., I.vii. For a discussion of the influence of Cicero in 18th century reason of state theory, see Miller, P. N. (1994). *Defining the common good : empire, religion, and philosophy in eighteenth-century Britain*. Cambridge ; New York, Cambridge University Press.

¹²⁸ Indeed, in linking the modern state with a secular temporal horizon, I am loosely following the path breaking work of two recent Machiavelli scholars, each of whom analyzed one of the two dimensions I am trying , bring together here: J.G.A. Pocock (time) and Quentin Skinner (the state).

¹²⁹ The two classic works here are *The Machiavellian Moment* and *Foundations of Modern Political Thought* vol. I.

using *lo stato* in reference to the *personal dominion* under a prince's control, and makes clear that he means to describe the unified institutions of government and coercive powers independent of the individuals who control them. Reflecting the idea that states have a past and a future of their own, independent of the prince that happens to hold them, Machiavelli refers to *stati* having their own unique foundations, customs and laws.¹³⁰ The state, existing in a secular political temporality proper to it, can now be described as an independent agent, with a realm of affairs of state that can be analyzed formally and abstractly.¹³¹ The link between secular political time and the beginnings of a concept of the state as an independent institutional agent is even clearer in the *Discourses* (although, as in *The Prince*, these new usages of *lo stato* occur amongst more frequent references to *stati* in the more traditional sense). For example, the comparison between perfect and imperfect foundings, which frames the central argument of Book I, unambiguously refer to Rome and Sparta as *stati* that have outlasted their founders by hundreds of years.¹³² This allows Machiavelli to link various public offices and institutional powers, distinct from the individuals who occupy and employ them, to an impersonal source of *unified agency* called "the state."¹³³ In a later discussion of corruption, he distinguishes even more explicitly between the power held by individual Roman magistrates and the authority of the laws

¹³⁰ *Prince*, ch. 21 Here I follow the arguments of Burkhardt, 23; Cassirer, E. and C. W. Hendel (1946). *The myth of the state*. New Haven, Yale University Press., 133-7; and especially Skinner, Q. and ebrary Inc. (2002). *Visions of politics Volume 2, Renaissance virtues*. Cambridge ; New York, Cambridge University Press: xix, 461 p., 378.

¹³¹ See for instance *Prince* ch. 3, and Skinner *ibid*.

¹³² I.2 and I.6. Skinner, 384.

¹³³ One example of this is the discussion in I.7 of the important role played by institutions of public accusation in maintaining a free state: "For those in a city who are responsible for guarding its liberty, there is no authority more useful and necessary than acknowledging the right of citizens to be publicly accused, before the people or before some magistrate or council, when they perpetrate an act against the free state. (A coloro che in una città sono preposti per guardia della sua libertà, non si può dare autorità più utile e necessaria, quanto è quella di potere accusare i cittadini al popolo, o a qualunque magistrato o consiglio, quando peccassono in alcuna cosa contro allo stato libero.) *Discorsi*, I.7.

and institutions in virtue of which they exercised power, and defines the latter as “the order of the government or, rather, of *lo stato*.”¹³⁴

This conceptual distinction between officeholders and the state arose in conjunction with a distinctive conception of political time, an awareness of a temporal order and a history that is proper to the political realm, analyzed by J.G.A. Pocock. Pocock’s notion of secular political time helps to emphasize the crucial *temporal* dimension of the idea of the state as an institutional locus of political power and rule with its own past and its own future that are distinct from whichever individual or social group who happens to occupy them at the moment. In Pocock’s account, the late-renaissance idea of a secular political temporality broke with the temporal immanence of the Greek and Roman cyclical framework,¹³⁵ in which a change of constitution, ruling group, and state directly overlapped with one another, and the medieval teleological framework in which the essence of political rule was doubly constituted by a hierarchical structure of duties and obligations, and teleologically situated within higher cosmic and divine orders.¹³⁶ In contrast, the autonomous institutions of political power could begin to be conceived independently of the officeholders at any particular moment in time only by locating the political realm in a distinctive temporal order of its own. Hence, the modern state corresponds to a modern conception of *secular, political time* – and a corresponding sphere of ongoing discussion and contestation over what should be done in the interests of the public good – distinct from the eternity of sacred time and the immanence of present time.¹³⁷

¹³⁴ 1.16 also quoted in Skinner, 385.

¹³⁵ Aristotle, Polybius

¹³⁶ Augustine, Aquinas (see discussion of Aquinas in Skinner, *Foundations* vol. I, 372]. The teleological, pre-modern concept of the state is visible in the reference to the “state” in the *Digest* of Roman law, which stated that “Since all law is established for the sake of human beings, we first need to consider the status [or state] of such persons before we consider anything else.” Quoted in Skinner, *Visions* vol. II, 369.

¹³⁷ Pocock, *Machiavellian Moment*, 49-83; Loader, I. and N. Walker (2007). *Civilizing security*. Cambridge, Cambridge University Press., 46.

Hence, we can combine the late renaissance conception of the state as a depersonalized institutional agent together with Pocock's analysis of the conceptual shifts made possible by the idea of secular political time in order to clarify and refine Pocock's implied suggestion that secular political time constitutes an internal relationship between republican civic norms and instrumental *raison d'état*. At the foundations of the famous *fortuna/virtù* couplet is a response to a key consequence of the secular, temporal emancipation of the political realm from the stabilizing forces of custom, tradition, or eschatology: the potentially destructive, dynamic elements of the contingent, the accidental, and the unexpected now play a central role in politics. Anthropologically, this occurs because an increased emphasis on secular human capacity and *virtù* at the same time highlight the unpredictable and never fully controllable power of *fortuna* to bestow or deny her gifts upon men. More importantly for our purposes, the centrality of contingency and fortune also has a deep sociological dimension. The basis of authority in civic republicanism core was not unbroken tradition or custom, nor divine grace, but the collective self-governing activity of the citizenry. The particular virtue it required was not piety, *noblesse oblige* or obedience, but the capacity to engage in collective, secular political decision-making and rule for the common good. Yet, as Machiavelli was intensely aware, these republican virtues were neither natural, nor given by history but were the product of a *vivere civile* – a fragile set of civic practices of participation and action held together by a social structure which made such “virtuous” practices possible. The republic both presupposed a civic consciousness and constituted an institutional structure that cultivated it.

The secularized, non-teleological conception of political time that made possible modern republicanism's restoration of the dignity and autonomy of the political realm, and the depersonalized conception of the state that accompanied it, came with soberingly high stakes.

The price of a life of civic activity among equals is an unprecedented vulnerability to fortune. A republic capable of sustaining such a life was not only a free state but a state of “well ordered” institutions capable of contending against its unique vulnerability to fortune: all republics (even Rome) are born in contingent and particularistic secular time, and die in secular time.¹³⁸

Machiavelli in particular was fond of contrasting the quasi-divine status of mythical founders to the wholly contingent and secular foundations of cities like Rome and Florence, which originated not in miracles but in *accidenti*.¹³⁹ Moreover, this awareness of temporal contingency was intensified by his first-hand observation of early-modern state formation, in which weak and vulnerable states were simply dismantled and swallowed up by larger and more powerful competitors, altogether disappearing from history. The republic’s existence in secular, contingent time also placed it in an unstable and dangerous set of spatial relations: since it had a beginning and an end in contingent, secular time, the republic, like any other state, had to fend for itself in an inter-state spatial order populated by other predatory and hostile political actors with their own fully secular and instrumental strategies.¹⁴⁰ Hence, when he reproduces classical theories of recurrent regime cycles, Machiavelli tended to abort the cycle at a weak moment, remarking that such a disorganized city will quickly be conquered and incorporated by some more powerful neighbor.¹⁴¹

In all of these arguments, Machiavelli emphasizes the radically contingent and fraught temporal and spatial orders in which the republican as a *state* finds itself. In other words, the republic inhabits precisely the same radically delegitimized condition as the central protagonist of *The Prince*. There, Machiavelli analyzed the condition of the new prince who, having

¹³⁸ Pocock, *Machiavellian Moment*, ch. 1.

¹³⁹ *Discourses* bk I... For analyses of Machiavelli’s use of *accidenti*, see Strauss, *Thoughts on Machiavelli* and McCormick, “Addressing the Political Exception.”

¹⁴⁰ Pocock, *Machiavellian Moment*

¹⁴¹ *Discourses*, bk I, early chapter on Polybius.

shattered the stabilizing effects of custom and tradition, is exposed to the raw contingency of fortune, which decouples political *virtù* from any stable basis in moral virtues. Similarly, from the argument we have been tracing in the *Discourses* Machiavelli concludes that the virtue necessary to preserve free states as *states* is defined by a different set of imperatives than moral or spiritual virtue, and at extreme moments may even sharply contradict with them. Republican *virtù* may require, in some circumstances, acts which are necessary for the city even at the price of one's soul.¹⁴² Republican *virtù* requires that citizens are prepared to "kill the sons of Brutus" if necessary, and unflinchingly destroy those who would bring down the republic. In contrast, Piero Soderini, who Machiavelli describes as "wise and good," is nevertheless condemned for his failure to prevent Florence's loss of liberty. Soderini did not act against the enemies of the republic because he flinched from violating moral virtues and feared that "in order vigorously to attack his opponents and to crush his adversaries, he needed to seize extralegal authority and to use the laws to destroy equality among the citizens." Lacking *virtù*, "through his inability to emulate Brutus, he lost both his position and his reputation, a loss in which his city shared."¹⁴³ Likewise, Machiavelli concludes that the hostile and predatory world of international affairs make pacifist isolationism unsustainable, concluding that the "Roman method" of internal participation and external expansion and domination of other cities "*must be followed*, and not that of the other [more pacific] states."¹⁴⁴ Thus, even the internal organization of republican civic life is determined by the "necessities" of external statecraft, war and dominion, even at the price

¹⁴² "when the safety of one's country wholly depends on the decision to be taken, no attention should be paid either to justice or injustice, to kindness or cruelty, or to its being praiseworthy or ignominious. On the contrary, every other consideration being set aside, the alternative should be wholeheartedly adopted which will save the life and preserve the freedom of one's country." *Ibid.*, III.41

¹⁴³ *ibid.*, III.3. That Machiavelli's own experience of the *vita activa* was another casualty of this loss is left unmentioned.

¹⁴⁴ *Ibid.*, I.6. my italics

of destroying other independent rival republics.¹⁴⁵ Machiavelli expresses this troubling line of continuity between “tyranny” and “a free state” in the following observation: “Anyone who sets up a tyranny and does not kill Brutus, anyone who introduces self-government [*uno stato libero*] and does not kill the sons of Brutus, cannot expect to survive long.”¹⁴⁶ The location of the state in a delegitimized and radically contingent word that decouples *virtù* from stable moral virtues is a common political axis shared by otherwise incommensurate political forms and projects.

This means that the clear-cut separation between republican politics and princely statecraft posited by Viroli is explicitly and directly rejected by Machiavelli. The focal point of *both* politics and statecraft is the free republican state preserving itself in contingent, tumultuous political time. Political freedom and civic virtues of equality and participation are vulnerable to internal and external enemies. Sustaining these goods does not just depend upon republican civic norms but also upon non-civic statecraft, violence directed against external and, if necessary, internal enemies. Whatever its form of government, the state finds itself within a strategic economy of violence. Freedom, in this tradition, means non-domination, participation and the rule of law for citizens,¹⁴⁷ *and at the same time requires* a sufficient centralization of power and autonomous political agency to prevent external attack and internal subversion.

If we step back into the Ciceronian framework still favored by Viroli, we might say that Machiavelli’s demonstration that the (modern) republic was as much a state as any principality, and hence that both were located within the same secularized political time and space, was nothing short of a Copernican turn in politics. It decentered the classical natural regime cycle and the Christian universal monarchy into a plurality of particularist states with their own intentions

¹⁴⁵ *ibid.*, II. 2-3.

¹⁴⁶ *Ibid.*, III.3.

¹⁴⁷ Many recent scholars reduce this to one dimension only, that of non-domination. But it seems fairly obvious that, while this is obviously an important dimension of republican freedom, Machiavelli uses republican freedom in a more capacious way.

and strategies, split political *virtù* into two interlinked but irreducible orientations toward strategy and normativity, locating politics as well as statecraft simultaneously within an economy of violence and an economy of virtue. Machiavelli, moreover, illustrated this tension with an elaborate rhetorical demonstration, at the heart of Book I, that contingently founded, socially discordant republics have no choice but incline toward empire and expansion abroad. It is precisely the imperatives of preserving the inclusive, broadly participatory vision of collective liberty that necessitates embracing *raison d'état*.

This paradoxical intertwining of collective liberty and *raison d'état* within the structure of the modern state traverses much of the subsequent republican tradition. It is a central theme, for instance, in the debates over parliamentary military organization during the English Civil War, where both critics and defenders of reason of state draw alike from republican principles, again illustrating the internal relationship between these conflicting principles.

Interestingly, this history overlaps to a striking degree with the history of perhaps the preeminent emergency institution in politics: the dictatorship. The history of the modern, as opposed to classical, dictatorship straddles the tension between various articulations of the project of collective liberty – or, after the French Revolution, popular sovereignty – and the imperatives of political order and organized violence that were to be the *temporary* bearer of that project. In this trajectory, emergency overlaps with revolution, and emergency powers are exercised for the sake of a future order rather than the *status quo ante*.¹⁴⁸ As Schmitt observed, there is strong evidence that Marx and perhaps even Lenin still understood the temporary emergency “dictatorship” of the proletariat in the transitional since of sovereign dictatorship.¹⁴⁹

¹⁴⁸ Schmitt famously calls this type of emergency powers “sovereign dictatorship,” and identifies it with the constitutional theory of the constituent power. By far the best study of this history in English is an unpublished manuscript by Andrew Arato, on file with author.

¹⁴⁹ Schmitt, *Dictature*, 18.

At The same time, the republican framework of “commissarial dictatorship” continued to be articulated through the tension between *raison d’état* and collective liberty in a wide variety of forms. The justification of dictatorship has the potential of inviting its own critique, since the means to preserve collective liberty can at the same time be questioned as a potential threat to collective liberty. In this section, I will contrast two different conceptions of how republican dictatorship as a domestic institution should to resolve the tension between liberty and reason of state. The first, drawn from Machiavelli himself, is depicted as an institutional form that translates external reason of state into the political life of the republic, exposing reason of state to the political contestation and popular participation that characterize democratic political life in general. In contrast to this, I discuss Rousseau’s depiction of dictatorship, which transforms the internal tension into a stark antithesis that isolates reason of state from popular participation, and prevents it from becoming the object of ordinary, republican politics.

Politics of the Exception and the Position of Dictatorship

Machiavelli’s conception of dictatorship draws from his view of republican institutions generally. First, he held that there was a reciprocal relationship between virtue and institutions. Good institutions channel popular passions and actions in a way that prevents the elite from usurping power, but at the same time prevent antagonism from becoming outright civil war. Good institutions prevent corruption, but since institutions are only channels for political action and desires, they presuppose broad participation in politics, and have no value without it.¹⁵⁰ The same institutions which made Rome great “would not be good in a corrupted state” with apathetic or disinterested citizens.¹⁵¹ Secondly, he depicted the institutions that make up a *stato*

¹⁵⁰ *Discourses* 1.17

¹⁵¹ *ibid.*, 1.18

libero as distinct from the authority of *all* magistrates who govern through them. While laws and specific magistrates could shift in response to emergencies, the institutional order itself was able to remain unchanged. Hence, emergency powers did not undermine the republican institutions themselves because emergencies did not exempted from the agonistic popular participation that animated political life generally. This participatory citizenry is what prevented the city's institutions from being undermined by ambitious elites using emergency powers for their own ends. The institutions of the republic, in turn, continued through a variety of emergencies to channel popular desires and conflict in a positive civic direction. Through this self-reinforcing process, reason of state and dangerous emergencies could appear within the civic life of the republic without rupturing or suspending its operations.

Third, Machiavelli warned that only totally corrupt and hopelessly disordered republics should risk allowing extra-institutional, or “extraordinary” [*straordinario*] means to defend themselves. Such extra-institution means are without exception extremely dangerous and highly unlikely to succeed.¹⁵² Most importantly, they can only be achieved by a one person; a prince. Hence, extraordinary means always involve breaking the ultimate authority of the people in a republic. The problem is not only legal or institutional rupture in the formal sense but that the state, even if temporarily, is held by one single person, and not ‘the public as a whole.’ Extraordinary measures require “the use of force and an appeal to arms, and, before doing anything, *to become a prince in the state, so that one can dispose it as one sees fit.*”¹⁵³ In a well functioning republic, then, the means to deal with contingency are *ordinary* ones that leave the

¹⁵² this is because such extraordinary renovations require either a good man willing to use bad means to make himself prince, or a bad man who will somehow use his authority to accomplish good ends. “E perché il riordinare una città al vivere politico presuppone uno uomo buono, e il diventare per violenza principe di una repubblica presuppone uno uomo cattivo; per questo si troverà che radissime volte accaggia che uno buono, per vie cattive, ancora che il fine suo fusse buono, voglia diventare principe; e che uno reo, divenuto principe, voglia operare bene, e che gli caggia mai nello animo usare quella autorità bene, che gli ha male acquistata.” *Ibid.*

¹⁵³ *ibid.*, 1.18

basic institutions and the popular authority intact.¹⁵⁴ The superiority of the multitude over a prince, Machiavelli argued, was that the best means of mediating the tension between collective liberty and reason of state was through the process of elucidation and collective judgment through ongoing agonism and conflict. Thus, in “when it had to obey dictators or consuls in the public interest, it did so.”¹⁵⁵ On the other hand, when the claims of reason of state became threats to collective freedom, the multitude could “take action against some powerful person... or others who sought to oppress them.”¹⁵⁶

Thus, the first striking characteristic of Machiavelli’s description of dictatorship is that it always takes shape in the context of political struggles and interests, but that – when it operates well – helps channel those conflicts in a way that preserves liberty. But it is entirely at play in the class politics of the city, never above them. For example, Machiavelli recounts the experience of Marcus Menenius, a plebian dictator, who was authorized by the people to investigate members of the nobility “who, moved by ambition, had sought to obtain the consulship and other posts in the city by other than accepted methods [*modi straordinari*].”¹⁵⁷ The nobility interpreted the authorization of the dictator as a direct attack on them, and in response disseminated the calumny that it was plebs who “having neither blood nor virtue on which to rely” used irregular means to get office, and attacked the appointment of Menenius on these grounds. In response, Menenius resigned, submitted his actions to judgment of the people and was acquitted.¹⁵⁸ Another example is the dictator (unnamed by Machiavelli) appointed in response to accusations by Manlius about

¹⁵⁴ *ibid.*, III.49.

¹⁵⁵ *Ibid.*

¹⁵⁶ *ibid.* The example Machiavelli gives was “Manlius, of the Ten;” i.e. the general sentenced by the anonymous dictator discussed above. Manlius was convicted and exiled, demonstrating for Machiavelli that the plebs can place the common good above their own suspicion for the nobles.

¹⁵⁷ 1.5. apparently, no such dictator ever existed, and the entire episode may have been invented by Machiavelli, possibly to suggest a parallel in the slanders used against Soderini. See McCormick, “Political Trials.”

¹⁵⁸ *ibid.*

private appropriation of public funds intended to enrage the plebs and cause popular unrest.¹⁵⁹

The Senate appointed a dictator to investigate the situation and restrain Manlius. The dictator and Manlius “confronted one another, the dictator surrounded by the nobles and Manlius surrounded by plebeians.” Manlius was asked to verify his accusations, and when he refused “the dictator sent him to prison.”¹⁶⁰ Hence, far from being outside or beyond politics, dictatorship is thoroughly caught up in and defined by the agonism and conflict that characterize political life as a whole.

Thus, to summarize the picture of the dictatorship that emerges from the *Discourses*, Machiavelli describes dictatorship as one of a series of Roman institutions that functioned to mediate reason of state and potentially destructive contingencies into the internal life of the republic. These institutions in various ways enabled the state respond to dangerous threats without disrupting the participatory and agonistic dynamics that preserved collective liberty. Dictatorship is an institution for responding to *particular* category of contingency: namely, “*accidenti istraordinari*,” extraordinary contingencies. It is useful because normally republican institutions are “slow in functioning,” whereas the dictator in an *accidenti istraordinari* concentrates authority for a short time “without consultation” and could punish without appeal. A key point is that the dictator responds to an extraordinary situation, but it is *an ordinary* institution; it responds to extraordinary events in a “*vie ordinarie*,” in an ordinary way. Indeed, republics that lack a dictatorship will be forced to respond to extraordinary events “*per vie istraordinarie*,” thus compounding the danger by violating their own institutions.

This background in Machiavelli’s more general theory of republican institutions provides a framework for understanding Machiavelli’s most detailed analysis of Dictatorship, in Book I

¹⁵⁹ 1.8

¹⁶⁰ *ibid*

Chapter 43 of the *Discourses*. He begins by criticizing the view held “by some Roman writers” who argue that dictatorship was the cause that eventually led to tyranny in Rome. These unnamed critics contend that without the dictatorship, “Caesar would not have succeeded under any other public title in making his tyranny look honest and above board.”¹⁶¹ The problem of with this view is that it was not the “name nor the rank of the dictator that made Rome servile, but *the loss of authority of which the citizens were deprived* by the length of [Caesar’s] rule.”¹⁶² In other words, the problem was not the institution of dictatorship at all – if the public title of dictator hadn’t existed, Caesar would have found another title. Instead, in Caesar’s hands the institution was used in an extraordinary rather than ordinary way because it ceased to be constrained by the authority of the citizens. As we’ve seen in the previous section, the reciprocal relationship between virtue and institutions also implies that once citizens become corrupt and no longer zealously defend the common good, the same institutions that promoted virtue can under corrupt conditions become disastrous – as the extraordinary dictatorships of Caesar and Sulla demonstrate. Machiavelli’s point here is that before corruption set in, dictatorship was a commendable institution only on the condition that authority was in the hands of the people, and they actively defended that authority against usurpation – this is what makes it “ordinary.” Blaming Caesar’s tyranny on the institution is not only a causal error, then, but backhandedly denies the authority of the citizenry.¹⁶³ This point is amplified in Machiavelli’s argument for the superiority of the masses [*la moltitudine*] over the prince. In Rome, we see that the Roman popular classes “neither ‘arrogantly dominate nor servilely obey.’”¹⁶⁴ Instead, in an uncorrupt republic, the masses can be trusted to uphold the common interest. When the masses needed to

¹⁶¹ *ibid.*, 1.43

¹⁶² *ibid.* my italics.

¹⁶³ *Ibid.*, 1.58.

¹⁶⁴ *ibid.*, 1.58.

“take action against some powerful person... or others who sought to oppress them” they do so, vigorously defending their freedom.¹⁶⁵ By the same token, the masses can only judge when dictators are in fact acting for the common good: “when it [*la moltitudine*] had to obey dictators or consuls in the public interest, it did so.”¹⁶⁶ Machiavelli’s defense of dictatorship, in other words, rests on the authority of the multitude to keep it in check, and the judgment of the multitude to appraise when obeying the dictator is in the public interest. Hence, Machiavelli points out that the abuse the dictatorship requires conditions “impossible for him to acquire” in an uncorrupt republic.¹⁶⁷ In addition to these informal, but crucial, informal restraints, there are also several institutional restraints on the dictatorship: (i) “the dictator was appointed for a limited time;” (ii) “only for the purpose of dealing solely with such matters as had led the appointment;” and (iii) he “could do nothing to diminish the constitutional position of the government [*diminuzione dello stato*].” The translation of *stato* here is somewhat misleading; he does not mean “state” in the modern sense as the abstract seat of sovereignty, but as the concrete status or holding of a free people; i.e. the “state” of the ‘sovereign’ Roman people. Thus, the dictator cannot “take away the authority vested in the senate or in the people” because the Roman ‘state’ belongs to them, not to the dictator.¹⁶⁸ Machiavelli’s different understanding of the word state clarifies his emphasis on the importance of *ordinary* institutions for dealing with emergencies. Not only is the “vie istraordinarie” unstable, it necessarily depends on “the virtue of some one person who is then living, not the virtue of the public as a whole.”¹⁶⁹ Overall, then, we could say that dictatorship here is firmly rooted in the “collective liberty” pole of this tension, and engages

¹⁶⁵ *ibid.* The example Machiavelli gives was “Manlius, of the Ten;” i.e. the general sentenced by the anonymous dictator discussed above. Manlius was convicted and exiled, demonstrating for Machiavelli that the plebs can place the common good above their own suspicion for the nobles.

¹⁶⁶ *Ibid.*

¹⁶⁷ *ibid.*

¹⁶⁸ *ibid.* On the meaning of the state in the republican tradition, see Quentin Skinner, *Visions of Politics, Vol. II*, final chapter.

¹⁶⁹ *Ibid.*, 1.17

the reason of state pole by “civilizing,” it e.g. translating it into a means of extending civic discourse and the preservative function of political agonism, even to experiences of urgent emergency.

Dictatorship as exception

Machiavelli’s constant emphasis on the *politics* of emergency powers is especially striking because it is in sharp contrast to dominant tendency in subsequent discussions of dictatorship as a republican emergency institution. Rousseau’s discussion of dictatorship in *The Social Contract* provides an illuminating example.¹⁷⁰ On the one hand, Rousseau was enough of a Machiavellian to see the self-preservation of the state as an absolute precondition for the possibility of collective liberty. He observes that

in such a case [of dangerous crisis] the general will is not in doubt, it is obvious that the people’s foremost intention is that the State not perish.¹⁷¹

Why is the general will not in doubt? Rousseau’s thought here, characteristically subtle despite its brevity, seems to be the following: The existence of the state is a necessary condition of possibility for the general will. The general will cannot possibly will its own destruction, or will

¹⁷⁰ A keen awareness of the tension between *raison d’état* and collective liberty can be seen throughout Rousseau’s works, as, for instance, in his eloquent statement of the dilemma in *Considerations on the Government of Poland*: “Brave Poles, beware, beware lest for wanting to be too well, you only make your situation worse. In thinking about what you want to acquire, do not forget what you might lose. Correct the abuses of your constitution, if it is possible to do so; but do not despise the constitution that made you what you are.” 178. His critique of Saint Pierre’s Project for Perpetual Peace illustrates both the importance of the problem for him, and his pessimism that it can be overcome. Intriguingly, Rousseau seems to have attempted to square this circle and leave behind the Machiavellian framework that embeds *raison d’état* in the modern state. There is a brief reference in *Emile* to Rousseau’s attempted solution, but he seems to have abandoned the effort and destroyed this work. For an interesting discussion, see Tuck, R. (1999). *The rights of war and peace : political thought and the international order from Grotius to Kant*. Oxford England, New York : Oxford University Press., 206-7.

¹⁷¹ *The Social Contract*, IV.6

that it does not will. Therefore, when the state is threatened with destruction, we know necessarily that the general will authorizes whatever measures are necessary to defend the state. If the means necessary to defend the state require suspending the “inflexibility” of the laws and deliberative procedures, then the general will necessary authorizes that these ordinary legal constraints be suspended. Rousseau’s emphasis that the general will “not in doubt” seems to indicate that authorization to suspend the law in such crises can be deduced as a logical necessity, without the assembly actually having to declare its will in fact. In this way Rousseau integrates the dictatorship into his theory of popular sovereignty.

On the other hand, Rousseau is keenly aware of the dangers that this priority of the state’s right to self-preservation pose to the institutions of collective freedom, and, stresses three important limitations that are definitive of this tradition of emergency powers. First, “only the greatest dangers” when “the salvation of the fatherland is at stake” can justify the suspension of the laws. Secondly, “it is important that [the Dictatorship’s] duration be fixed to a very brief term which can never be extended.” If the power of the dictatorship is maintained beyond this brief period (Rousseau suggests six months), it will invariably become “tyrannical or vain.” Thirdly, the separation of powers is suspended but not abolished. Indeed, in the case of less severe emergencies that require only a suspension of the structure of the government, the appropriate model is not the dictatorship but the “consecrated formula” by which the Roman Senate empowered the Consuls with emergency authority. Since for Rousseau the government is always conceived as an executive magistrate delegated by the sovereign, this does not require suspending the laws themselves but only the means of administering them. Only when the emergency is so severe that the state’s preservation requires suspending the laws themselves, a dictator is named and the Sovereign authority is provisionally suspended for the duration of the

emergency. In this period, the dictator has the unconstrained executive powers but no legislative ones; “he can do everything, except make laws.

Interestingly, Rousseau does not seem especially concerned with what, for author theorists of dictatorship, was a core question – the distinction between the authority to declare emergencies and the authority vested with emergency powers. His description of how the dictator is nominated intentionally leaves the identity of the agent doing the nominating unspecified: in the case that the laws are an obstacle to preserving the state, “alors *on nomme* un chef suprême qui fasse taire toutes les lois” (Gourevitch’s English translation captures this ambiguity by using the passive voice: “a supreme chief *is named*...”).¹⁷²

While he doesn’t quite make this explicit, his logical deductive authorization of dictatorship by the general will and his description of dictatorship seem to suggest that he envisions both the *declaration* of the emergency and the dictatorship itself to be forms of *executive* authority. Much more important for Rousseau is to insist that the sovereign authority, while suspended, is not “abolished.” The dictator is emphatically a delegated commissioner acting at the behest – even if only as a logical postulation – of the popular sovereign. Thus, the dictator can “do everything, except make laws.” Even more importantly, he may “dominate” the legislative power, but he cannot represent it. This is crucial for Rousseau, since, as we shall see in more detail in the next section, he identified sovereignty with the will, and therefore rejected the possibility of representation of the legislative power as usurpation.¹⁷³ A final characteristic of Rousseau’s discussion that is somewhat surprising, especially in comparison to his apparent lack of concern with the nominating agent, is his strong concern that dictatorship remain an

¹⁷² *ibid.*, IV.6. Later in the chapter, Rousseau again leaves the identity of the nominating agent unclear: “whatever may be the manner in which this important commission is conferred, it is important that its duration be fixed to a very brief term...”

¹⁷³ *ibid.*, II.1

exceptional and extraordinary institution that is used only infrequently, in moments of the greatest possible importance. He condemns the Roman practice of conferring a dictator for performing public rituals, ceremonies and other formalities in addition to overcoming an existential crisis. While most early modern commentators on the dictatorship tended to criticize the danger of overusing the office, which could lead to abuse, Rousseau's concern is the opposite: "it is not the danger that it might be abused but the danger that it might be debased which prompts me to object to the indiscriminate use of this supreme magistracy." Thus, Rousseau condemns the appointment of dictators for trivial or ceremonial reasons, which lead to it being regarded as a "vain title." Conversely and for the same reason, he criticizes the Senate's failure to nominate a dictator during the Catiline conspiracy, a supreme crisis that would have merited the exceptional office.

What unites both Rousseau's disinterest in the problem of the nominating agency, and the peculiar concerns about debasement and disuse, is his underlying expectation that dictatorship must remain an extraordinary institution *above and outside of politics*. His logical postulation that the general will always wills a dictator to save the state from destruction actually obscures the fundamental political question of how such a circumstance is identified, what degree of probability or risk is a threshold, and who is qualified to participate in such decisions. The brisk references to self-preservation and immanent peril present an image of incontestability and definitiveness that obfuscate the fact that even the most severe emergencies involve *political judgments*, calculations of risk and probability, and the weighing possible alternatives in light of collective commitments. These are the features of emergency politics, and the assumptions of incontestable necessity depoliticizes the emergency institution of dictatorship. This is especially clear from Rousseau's anxiety that the various ritual and ceremonial functions of dictatorship

will “debase” the institution and deprive it of its exalted status beyond the competitions for honor and status and accompany the designation of more quotidian political offices. The same reasoning underlies Rousseau’s criticism of the *senatus consultum ultimum* in the late Republic; Rousseau suggests the Cicero avoided having a dictator appointed to put down the Catiline conspiracy because he wanted to be sure he received the honor and glory of that commission himself. Once again, Rousseau’s aversion is to degrading the special prestige and honor of the emergency magistrate by investing it with the motivations and ambitions that accompany the ordinary political struggles for office and power. Both illustrate the danger in Rousseau’s eyes of infecting the pristinely exceptional status of dictatorship, which corresponds directly to the supra-political principle of the right to self-preservation, with the conflicts and interests that characterize ordinary politics.

Defining Self Preservation

Both Machiavelli and Rousseau, then, regarded dictatorship as a means of coping with the tension between collective liberty and self-preservation. They do so, however, in very different ways. Machiavelli conceived of dictatorship as an institutional means of *extending* the agonistic political life of the city to continue even during serious emergencies, subjecting judgments of necessity to the multiplicity of political interests and positions and depicting even the dictatorial exercise of emergency power as an object of popular contestation and negotiation. Rousseau takes the opposite approach and radically separates exceptional dictatorship and popular self-rule, insulating emergency politics from popular political judgment and locating the exceptional means to self-preservation in the rarified, supra-political space of the exception.

What conclusions can we draw from this contrast? I argued in the previous chapter that the language of self-preservation often presents an illusory certainty about the identity of the “self” that is being preserved, and the means that are “necessary” for its preservation. Rousseau’s strategy of strictly delimiting collective freedom and self-preservation into the respective spheres of norm and exception requires this illusory certainty, and is designed in turn to maintain it. Such a strategy cannot avoid the grim possibility that Rousseau himself may have glimpsed, of the general will *a priori* authorizing emergency powers that it cannot examine, in which the assembly is dominated and silenced by emergency magistrates in the name of its own preservation. In contrast, Machiavelli’s solution is not to eliminate or permanently resolve the tension between liberty and self-preservation but to accept it as a permanent condition of republican politics, and to channel it institutionally into a politics of disclosure and public judgment through permanent civic antagonism.

II. The State as the Political Unity of the People: Identity, Representation and Plebiscitarian Emergencies

But the Common-wealth is no Person, nor has capacity to doe any thing, but by the Representative, (that is, the Sovereign;) ... [The] Common-wealth, without Sovereign Power, is but a word, without substance, and cannot stand.

Thomas Hobbes, *Leviathan*, chapters 26, 31.

Sovereignty, which is initially only the *universal* thought of this ideality, can *exist* only as *subjectivity* which is certain of itself, and as the will's abstract – and to that extent ungrounded – *self-determination* in which the ultimate decision is vested. This is the individual aspect of the state as such, and it is in this respect alone that the state itself is *one*.

G.W.F. Hegel, *Elements of the Philosophy of Right* §279.¹⁷⁴

This section focuses on the tension between two different conceptions of representation and the unity of the state: on the one hand, the depersonalized, juridical concept of “the state” unified symbolically by representation; on the other hand, the state as a substantive, pre-juridical entity whose unity is constituted by something more concrete and existential than representation as a symbolic or juridical fiction.¹⁷⁵ These two different conceptions, and the different forms of representation they entail, have persisted since the 17th century in an often tense and dynamic co-existence, combining, recombining and adopting themselves to changing constitutional and political configurations. As I will show, they constitute another important arena of emergency politics, establishing the terms through which emergencies are defined and debated. In particular, I shall focus on how this conceptual tension gives rise to the close link between emergencies as plebiscitarianism, decisionism and representation as incarnation. As in the previous section, I draw from early modern sources in order to show how this structural tension within the modern

¹⁷⁴ Ed. by Wood and Trans. by Nisbet, 316-7.

¹⁷⁵ This formulation, as we shall see, draws upon Carl Schmitt's discussion in *Constitutional Theory*

concept of the state, and indicate some of the major patterns in which this tension persists and becomes an arena for emergency politics.

As we've already seen, when the term "the state," begin to be used regularly in political contexts from the 14th century, they referred to the political status or standing of political rulers.¹⁷⁶ In addition to the personal status of principalities, "the state" was also used in this period to describe the political status or standing of a group or body of people, such as, for instance, the orders of the *Etats generaux* consisting in the three principle states or estates in the kingdom. According to Quentin Skinner, the first important semantic innovation in "the state" occurred with renaissance republican authors, who begin to use "the state" to "refer not merely to bodies of people over whom sovereigns held power, but also to the bearer of sovereignty itself."¹⁷⁷ So for example, a republic could be characterized as a *status popularis*, in which the citizen body rules itself and therefore lives in a "free state" or a state of liberty. The ambiguity is that "state" here refers to the citizen body both in the more traditional status or standing, and in the more modern sense of the bearer of sovereignty. The modern republican association of state with sovereignty was a further step taken by radical English republicans writers in the mid-17th century. Authors such as Henry Parker expressed the idea that that the body of the people is always the true bearer of sovereignty by arguing that, "since the people can in turn be said to comprise all the different estates of a commonwealth, and hence amount to 'the whole state,' one can speak of sovereignty as a property of the state."¹⁷⁸ Hence, the first modern meaning of "the state" belongs to the republican tradition of popular sovereignty, according to which the state as the bearer of sovereign power is equivalent to the body of the people or community as a whole.¹⁷⁹

¹⁷⁶ Skinner, *Visions of Politics*, Vol. II

¹⁷⁷ Skinner, "How we acquired," 4.

¹⁷⁸ *Ibid.*, 5.

¹⁷⁹ *Ibid.*, 11.

The second, subsequently dominant conception of the state owes itself to the most formidable opponent of those 17th century republicans: Thomas Hobbes. In Skinner's persuasive account, Hobbes' central preoccupation as a political theorist was to discredit theories of republican liberty.¹⁸⁰ One of his strategies was to undermine the republican idea that the true bearer of sovereignty is the body of the people by depicting a "natural" condition of humankind as a multitude of isolated, atomistic, vulnerable and violent individuals. In other words, there is no such thing as the body of the people without first being represented. This occurs, and the "Multitude of men are made *One Person*," when they agree to authorize an individual or assembly to act as their sovereign representative.¹⁸¹ It is only the act of being *represented* by the sovereign that makes the multitude into a single entity, and brings this legal or juridical "person" into existence.

By adopting this argument Hobbes meant to undermine the coherence of the republican idea of the body of the people as the bearer of sovereignty. Yet, in making the monarch (or assembly) a *representative* of legal personhood, Hobbes also broke with the traditional royalist identification of the king with the sovereign. For Hobbes, the king is a mere occupant of the "office of the sovereign representative," chosen to "bear the person" of the multitude for their own safety and welfare. Thus in Hobbes account, sovereignty belongs neither to the king nor the people. The subject of sovereignty is not any natural person, but the "COMMON-WEALTH, or STATE," that is, the juridical, artificial person that unifies the multitude when each individual covenants to be represented by it.¹⁸² In other words, as Skinner's interpretation makes clear, for

¹⁸⁰ Skinner, Q. (1996). *Reason and rhetoric in the philosophy of Hobbes*. Cambridge ; New York, Cambridge University Press.

¹⁸¹ Hobbes, *Leviathan*, chap. 17

¹⁸² *ibid.*

Hobbes the *state* or commonwealth is nothing but a legal relation, a juridical device that allows the sovereign representative to speak and act in the name of an artificial unity of the multitude.¹⁸³

What is the effect of this rather strange and intricate bit of argumentation? One effect we have already seen: the concept of the state as an artificial person represented by the sovereign was intended to permanently discredit the republican idea that the body of the people could be the bearer of sovereignty, as well as traditional paternalist or theological foundations of absolutism. A second consequence of Hobbes' juridical theory of the state is that, by transforming the state into a *form* of the relationship between sovereignty and subjects, Hobbes radically disembodies and depersonalizes all political authority, even that of the "natural" person of the monarch. In spite of Hobbes' vociferous antipathy toward republicanism, we can see why he became the target of so many of his more traditional royalist contemporaries. Sovereignty can no longer be attached to the singular person or "natural body" of the king, but is transformed and depersonalized into an *office*. As Hobbes puts it, "I speak not of the men, but (in the Abstract) of the Seat of Power," and entitles his analysis of the powers of sovereignty "The Office of the Sovereign Representative."¹⁸⁴ Indeed, while he made no secret of his preference for monarchy, Hobbes consistently acknowledged that the office of sovereignty can be filled by an assembly just as consistently as by a monarch.¹⁸⁵

Paradoxically, the fact that the state, rather than the person of the sovereign, is the "seat" of sovereignty, and therefore the "natural" person of sovereignty is a mere representative, means that sovereigns are no longer the proprietors of their sovereignty.¹⁸⁶ Rather, they occupy an office

¹⁸³ *ibid.*, ch. 26

¹⁸⁴ Hobbes, Epistle Dedicatory, chap. 30 respectively.

¹⁸⁵ indeed, many interpret his *Leviathan* as an attempt to convince fellow royalists that the civil war had been lost and that they owed allegiance to the now-sovereign parliament. See chap. 21, pgs. 153-4 and "A review, and Conclusion," pg. 484-5 especially.

¹⁸⁶ Loughlin, "Ten Tenets of Sovereignty," in Walker, N. (2003). *Sovereignty in transition*. Oxford, Hart., 65.

and are charged with the duties of that office.¹⁸⁷ When the sovereign fulfills the duties of his office, the actions he performs should properly be seen as on behalf of the person he represents – namely, the state – rather than his own natural person.¹⁸⁸ In this respect, by grounding the unity and public nature of the modern state in the representative device of fictive juridical personhood, Hobbes grounded the central institution of political modernity – the state – on an oddly de-substantialized and ethereal fiction.¹⁸⁹ The radically formalist and essentially empty structure of Hobbes' state or commonwealth is simply a reflection of the structure of Hobbesian representation. Thus by defining the sovereign as not only a mere “representative” but as the representative of a legal *fiction* no less, Hobbes would appear to be grounding monarchical power on exceedingly thin and legalistic foundations. In fact, the opposite is true, for two crucial reasons. First, the inability of the de-substantialized, juridical body to “doe any thing” on its own¹⁹⁰ is paradoxically the source of the absolute power of the sovereign. Precisely because the Person the sovereign represents is a legal fiction, the mere name of a unidirectional relation of authority between sovereign and subjects, this requires that the sovereign is absolutely unrestricted in his capacity to speak and act on the state's behalf. Like all other purely artificial persons the state is *incapable of acting or authorizing on its own behalf, but nevertheless is an*

¹⁸⁷ Hobbes, *Leviathan*, Ch. 30. Admittedly, so long as the commonwealth is not dissolved, in fulfilling those duties the sovereign is accountable only “to God... and to none but him,” at least on the level of formal rights and duties (231). Momentarily stepping back from his normative analysis of rights and duties, Hobbes admits in a wearier, realist tone that the “Negligent government of Princes [is naturally punished with] Rebellion; and Rebellion, with Slaughter.” (ch. 31, pg. 254).

¹⁸⁸ Hobbes defines “Civill Law,” for example, as the command of the “*Persona civitatis*, the purpose of the Common-wealth,” or state. Chap. 26, pg. 183. For Hobbes' distinction between the sovereign representative and the “natural person” of the individual occupying that office, see Chap. 23, 166; chap. 24, 173-4. Interestingly, we can glimpse here Hobbes' reformulation and demystification of the medieval juridical theme of the “king's two bodies,” famously analyzed by Ernst Kantorowicz.

¹⁸⁹ David Runciman, “The concept of the state: the sovereignty of a fiction,” in Skinner, Q. and B. Stråth (2003). *States and citizens : history, theory, prospects*. Cambridge, U.K. ; New York, Cambridge University Press.

¹⁹⁰ *ibid.*

“actual” person that can be represented and to whom action can be attributed.¹⁹¹ Existing only by virtue of being represented, the state can only speak through the mouth of the sovereign, and can only act through his agency. The Person of the state or Leviathan *fictively* represents the multitude as a unity, and the sovereign has the unique right to *actually* represent the state, the unity of the entire social body.

Secondly, this curiously double structure of representation is a source of actual absolute power only insofar as Hobbes can ensure that the commonwealth is “more than Consent, or Corcord; it is a reall Unitie.”¹⁹² As we’ve seen, however, Hobbes’ radically formalist account of representation eliminated any material basis in shared traditions, custom, belief or other sources of homogeneity. This legal fiction of a public without a physically present people, eerily represented in the famous title page engraving of the immense body of the commonwealth, made of the individual bodies of the subjects, towering over an empty, depopulated city. How could such a construction be more than an ephemera? In fact, Hobbes secures a source for a permanent “reall Unitie” of the commonwealth by transforming the natural condition outside the boundaries of the commonwealth into a kind of permanent state of exception, ever-present just beyond the state’s borders and beyond the limits of its authority. Inverting the customary identification of peace rather than war as the normal condition, Hobbes’ account of the “natural condition of mankind” as an unending war of all against all literally posits the exception as the ever-present, immanent condition that continuously provides “real” unity to the commonwealth.¹⁹³ The state of nature as an undifferentiated state of exception creates an equally “undifferentiated” normalcy,

¹⁹¹ The first three are from *Leviathan* ch. 16, the last is from Hobbes’ example in *De Homine* of the theatrical *persona* of Agamemnon, which is understood to be “impersonated” by the natural person of the actor onstage, so that the actor’s actions are both “truly” and “by fiction” taken to be the actions of the *character* or *persona* of Agamemnon. *De Homine*, XV, 1. For two contrasting interpretations, see Pitkin, 28 and Skinner, *Visions* vol. II, 193.

¹⁹² Chap. 30, pg. 232.

¹⁹³ See for example, 128. Schmitt, interestingly, negatively characterizes Hobbes’ sovereign as a permanent dictatorship in *La Dictatur*, 39.

thus from the point of view of the subject dissolving all possible valuations and gradations between regime types into a single question: am I safer obeying the sovereign, or at war with him?¹⁹⁴ Just as importantly, the identity of the commonwealth itself is constituted by the exceptional right to self-presentation in an ongoing state of war, since the commonwealth is simply a personification and unification all the judgments about the means to self-preservation that each of its members possessed. Its homogeneity is constituted by the decision of each individual to authorize to be represented by the commonwealth and “acknowledge himself to be Author of whatsoever he that so beareth their Person, shall Act, or cause to be Acted, in those things which concerne the Common Peace and Safetie.”¹⁹⁵ Thus, Hobbes bolsters his otherwise remarkably thin and formalistic basis for absolute sovereignty by constituting the unity of the commonwealth through a permanent state of exception.

Ironically, some subsequent theories of *popular* sovereignty would retain the basic structure of Hobbes’ framework, while attempting to repopulate the empty city of the *Leviathan* frontispiece by making the city coincide with the body of the sovereign itself. The shift from absolute to popular sovereignty, and from formal to substantive homogeneity, transformed but did not eliminate the problem of the exception.

Rousseauian immanence: from the representation to the identity pole

A striking example of Hobbes’ paradoxical influence on subsequent theories of popular sovereignty can be seen in the work of Jean-Jacques Rousseau. Interestingly, Carl Schmitt

¹⁹⁴ Of course, Hobbes does provide some prudential grounds for favoring monarchy. But these are only relevant from the perspective of the observer, i.e. the philosopher or advisor. The point of view that most preoccupied Hobbes, however, was that of the individual deciding whether to obey, and Hobbes construction of this perspective rigorously excludes any possible evaluative judgment about the nature of “normalcy” – if a state of normalcy exists, it is always rational to enter it, i.e. to obey the sovereign.

¹⁹⁵ Hobbes, *Leviathan* Ch. 17.

selected Hobbes and Rousseau as representatives of the two contrasting principles of constituting political unity as a state form. For Schmitt, every state form concretely expresses “the status of political unity” of a people.¹⁹⁶ He identifies Hobbesian representation and Rousseauian identity as two ideal-typical “poles” of how the political unity of a people can be achieved. While Schmitt regarded these two authors as paradigmatic opposites, it is striking that Rousseau, despite his frequent polemics against Hobbes, Rousseau adopts almost wholesale Hobbes’ juridical conception of the relationship between sovereignty and the state.

The (non-trivial) difference, of course, is that Rousseau transforms Hobbes’ monarchical absolutism into a radical theory of republican popular sovereignty, in which the only legitimate sovereign is the physically assembled people themselves.¹⁹⁷ Consequently - with total consistency with Hobbes – Rousseau must radically separate representation from sovereignty, and relocate in the relationship between the sovereign and its executive magistrates. Rousseau, in other words, accomplishes a rather astonishing feat of maintaining *both* the Hobbesian and earlier republican definitions of the state in a single juridical republican theory. Out of a multitude of “hommes épars,” the “unity” created by the social contract is one in which the natural and artificial body (“corps moral et collectif”) overlap directly onto one another. Thus, the name for this “personne publique” is “*Etat* quand il est passif,” and “*Souverain* quand il est actif[.]” The state, then, becomes both (in Rousseau’s terms) the “body of people as the bearer of

¹⁹⁶ Schmitt, *Constitutional Theory*, 239.

¹⁹⁷ Rousseau, *Social Contract* Book I, chap. 6: “*Chacun de nous met en commun sa personne et toute sa puissance sous la suprême direction de la volonté générale; et nous recevons en corps chaque membre comme partie indivisible du tout.*”

A l’instant, au lieu de la personne particulière de chaque contractant, cet acte d’association produit un corps moral et collectif composé d’autant de membres que l’assemblée a de voix, lequel reçoit de ce même acte son unité, son *moi* commun, sa vie et sa volonté. Cette personne publique qui se forme ainsi par l’union de toutes les autres prenait autrefois le nom de *Cité*, et prend maintenant celui de *République* ou de *corps politique*, lequel est appelé par ses membres *Etat* quand il est passif, *Souverain* quand il est actif, *Puissance* en le comparant à ses semblables. A l’égard des associés ils prennent collectivement le nom de *Peuple*, et s’appellent en particulier *citoyens* comme participants à l’autorité souveraine, et *sujets* comme soumis aux lois de l’Etat. Mais ces termes se confondent souvent et se prennent l’un pour l’autre; il suffit de les savoir distinguer quand ils sont employés dans toute leur précision.”

sovereign power” *and* (in Hobbes’s words) the “purely fictional Person whom the figure of the sovereign bodies forth.”¹⁹⁸

How can such an identity be possible? Rousseau’s solution enabled him to occupy what Hobbes called “the office of the sovereign representative” with the totality of every individual will, *unified* into a single, supreme general will. In contrast to the “will of all” or the sum of all particular wills, the general will expresses the will of the body politic as a unity and totality.¹⁹⁹ As such, it shares with Hobbes’ absolute sovereign the fact that it is the source of law and cannot be bound by any prior law;²⁰⁰ that it is incapable of being wrong;²⁰¹ and that it can be neither divided nor alienated.²⁰² Since the general will itself constitutes the only possible criteria and yardstick for the popular sovereign, it acknowledges no limitations to its own authority. It “can only be represented by itself,” and “by the mere fact that it is, is always everything it ought to be.”²⁰³

Rousseau’s achievement in holding on to both the republican and juridical conceptions of the state, and making Hobbesian sovereignty *popular*, came at a very high political price; not only abolishing representation from legislation but, also excising all interests, associations, and deliberation from the citizen body,²⁰⁴ and thirdly, requiring a political form that allowed for the direct physical presence of all citizens – the city state – that already by the mid-18th century was located increasingly on the margins of history.²⁰⁵ Moreover, despite its omnipotence within its own proper sphere, Rousseau’s solution of basing popular sovereignty on substantive identity in

¹⁹⁸ These phrases come from Skinner, “How we acquired...,” pg. 11. Skinner, however, is concerned with contrasting these definitions rather than analyzing how they can be brought together.

¹⁹⁹ Rousseau, *Social Contract*, II.3

²⁰⁰ *ibid.*, I.7

²⁰¹ *ibid.*, II.3

²⁰² *ibid.*, II.1-2

²⁰³ II.1, I.7. see also II.12.

²⁰⁴ Urbinati, N. (2006). *Representative democracy : principles and genealogy*. Chicago, University of Chicago Press.

²⁰⁵ Cf, for example, Spruyt, H. (1994). *The sovereign state and its competitors : an analysis of systems change*. Princeton, N.J., Princeton University Press., chap. 8.

place of symbolic representation was a remarkably fragile and tenuous artifice. The unity of the general will, constituted by the common point of intersection of all individual wills, requires that each citizen must deliberate, alone, from the position of total equality and reciprocity.

Rousseau's idealism did not lie in his overestimation of the capacity of individual citizens to immediately intuit the common good.²⁰⁶ On the contrary, he is highly attentive to the tendency of individuals to error and mistake their own private interest for the common good. But the people may form factions, become corrupt, fragmented or apathetic.²⁰⁷ Conversely, the executive magistrates may attempt to marginalize, silence or prevent the sovereign from regularly assembling and exercising its proper will. All of these introduce forms of *meditation* into the immediate identity between state and sovereign, signaling the silencing of the general will, the onset of corruption or usurpation, leading to the death of the body politic.²⁰⁸

Rousseau advances two different kinds of solutions to maintain the immanent identity between state and sovereign. The first are procedural and institutional; for instance, the assembly is restricted to passing only abstract and general laws framed by an executive magistrate,²⁰⁹ in order to prevent factionalism deliberation is be forbidden, etc.²¹⁰ The second type of solutions Rousseau advocates are moral and ideological rather than institutional and procedural. Thus Rousseau speaks of the most important of all category of laws, those that are engraved in the hearts of citizens and substitute the force of habit for that of authority²¹¹ and advocates a civil religion channeling worship and the sacred into civic ends. This "divine civil or positive right"

²⁰⁶ Rousseau was especially critical of democracy (which he defined in terms of the organization of the executive rather than the sovereign, which was the same everywhere) as a fatally unrealistic overestimation of human nature. "On ne peut imaginer que le peuple reste incessamment assemblé pour vaquer aux affaires publiques, et l'on voit aisément qu'il ne saurait établir pour cela des commissions sans que la forme de l'administration change." III.4

²⁰⁷ II.3, 6-10; III.10-14, 18

²⁰⁸ Urbinati, *Representative Democracy*, 72-5.

²⁰⁹ Rousseau, *Social Contract*, III.1.

²¹⁰ *ibid.*, III.17-18, II.3, 6.

²¹¹ *Ibid.*, II.12.

fosters the ethical bases of sociability, patriotism, citizenship and reverence for the law and the *patrie*.²¹²

Hence after setting out the structure of popular sovereignty as identity in Book I, much of the remainder of *The Social Contract* is dedicated to identifying the various threats to this identity and unity, and exploring both institutional and “moral” means for maintaining it. The importance Rousseau assigns to this task, and his untempered pessimism that even the best and most well-ordered state will eventually perish,²¹³ both suggest a disquieting possibility that the gap or persistence of mediations between the state and the sovereign may well be permanent and ineradicable. In this case the normativity of the *volonté générale* risks becoming inverted: a postulated status of absolute unity and identity serves only to highlight a gap between a condition of right and the means required for the realization of that condition. The failure to synthesize force and right appears from the perspective of state unity and identity as an aberrant exception requiring extraordinary measures – even if this gap is factually closer to an ordinary rather than extraordinary condition. This seems to be what Koselleck has in mind when he observes that for Rousseau “the absolute general will that recognizes no exception is alone the exception.”²¹⁴ In other words, the imminent identity of Rousseau’s popular sovereign is both absolute, unbounded

²¹² *ibid.*, IV.8. Interestingly, not only does Rousseau’s entire discussion read like an exploration of the most radical implications of Hobbes’ discussion of religion in the *Leviathan*, it is one of the few moments when Rousseau actually praises Hobbes by name: “De tous les auteurs chrétiens le philosophe Hobbes est le seul qui ait bien vu le mal et le remède, qui ait osé proposer de réunir les deux têtes de l’aigle, et de tout ramener à l’unité politique, sans laquelle jamais Etat ni gouvernement ne sera bien constitué. Mais il a dû voir que l’esprit dominateur du christianisme était incompatible avec son système, et que l’intérêt du prêtre serait toujours plus fort que celui de l’Etat. Ce n’est pas tant ce qu’il y a d’horrible et de faux dans sa politique que ce qu’il y a de juste et de vrai qui l’a rendue odieuse.”

²¹³ *Ibid.*, III.11

²¹⁴ Koselleck, R. (1988). *Critique and crisis : enlightenment and the pathogenesis of modern society*. Cambridge, Mass., MIT Press., 164. Koselleck’s reading of Rousseau is often insightful but suffers from overstatement and hyperbole. Koselleck is so focused on linking what he sees as the pathological moralism of the Enlightenment to the excesses of the Jacobin terror and later revolutionary and even Nazi dictatorships, his frequently erudite and careful historical scholarship is punctuated with astonishingly anachronistic and distorted interpretations of figures such as Rousseau and Kant. Nevertheless *Critique and Crisis* remains a valuable and illuminating work in many respects, despite its failure to substantiate its central hypothesis. For a strong rebuke of Koselleck’s anti-Enlightenment thesis, see Zeev Sternhell, *Les anti-lumières*.

and at the same time extremely frail, and its affinity with states of exception resides in precisely this combination of omnipotence and fragility. Hannah Arendt made a similar observation in *On Revolution*, when she pointed to Rousseau's observation that two different interests will unite themselves together when confronted by a third that is equally opposed to both. "Politically speaking," Arendt argues, Rousseau "presupposed the existence and relied upon the unifying power of the common national enemy. Only in the presence of the enemy can such a thing as *la nation une et indivisible*, the ideal of French and of all other nationalism, come to pass."²¹⁵ Perhaps detecting the strong Rousseauian strain in Carl Schmitt, Arendt finishes the thought observing that "national unity can assert itself only in foreign affairs, under circumstances of, at least, potential hostility."²¹⁶

The dialectic of identity and representation

As we've seen, the absolute character of Hobbes' formal symbolic representation effectively dissolves any meaningful distinction between norm and exception. Hobbesian representation means authorizing to the sovereign all rights to judge what constitutes a danger to the members of the commonwealth.²¹⁷ The sovereign, existing in an external state of nature vis-à-vis other sovereigns, represented all subjects' judgments about friends and enemies, norm and exception, and the means required for self-preservation. But since formal symbolic representation was a means of depoliticization and neutralization of ideological and moral passions, at the same time it was a kind of "normalization" of the exception. Juridical representation as authorization

²¹⁵ Arendt, H. (1990). *On revolution*. London ; New York, Penguin Books., 67.

²¹⁶ Ibid.

²¹⁷ Hobbes, *Leviathan*, Chap. 18, 126. Hobbes of course acknowledges certain limits to the individual's alienation of his natural right, recognizing for instance the individual "right to run away" in circumstances when his own death is immanent (on the battlefield, on the scaffold, etc.), see chap. 21. The exact location of this boundary remains a source of dispute

dismissed, in a single stroke, the voluminous 17th century legal debates over the proper scope and boundaries of the sovereign prerogative that inhered in the person of the King.²¹⁸ Hobbes was free to ignore the elaborate ancient constitutionalist framework distinguishing between law-governed *jurisdictio* and the extra-legal *gubernaculum* within which the king's discretion was supreme.²¹⁹ In their place he offered an elegantly simple solution: the state is the juridical person to whom all actions by the sovereign or public officials are attributable. Juridical representation is what grants *all* official actions – from the sovereign to the lowest public official or soldier – the force of law; i.e. their legal authority and claim to obedience derive from the fact that all such actions are attributable to the person of the state, and hence, are “owned” by the individual members of that state.²²⁰ Thus Hans Kelsen's remark that, like King Midas, everything the law touches turns to law, can be applied equally to Hobbes' theory of juridical representation: everything attributable to the state has force of law.²²¹

I've argued that, adopting Hobbes' definitions of state and sovereignty, Rousseau replaces juridical representation and legal-rational legitimacy with immanent identity and democratic legitimacy. Whereas Hobbes offered an implausibly meager and thin account of the bonds holding together the commonwealth, Rousseau required an extraordinarily thick and cohesive unity in order to even approach the radically immanent identity required by his concept of popular sovereignty. Despite his discussion of a large array of institutional and ethical means

²¹⁸ It is highly conspicuous that, to the authors knowledge, Hobbes the royalist never once mentioned the royal prerogative. In the context of the constitutional debates – particularly amongst royalists – in the 1640s, Hobbes silence is quite deafening, and points to just how radically he departed from his more traditional royalist companions.

²¹⁹ See, McIlwain, C. H. (1958). *Constitutionalism, ancient and modern*. Ithaca, N.Y., Great Seal Books., Pocock, J. G. A. (1987). *The ancient constitution and the feudal law : a study of English historical thought in the seventeenth century : a reissue with a retrospect*. Cambridge Cambridgeshire ; New York, Cambridge University Press.

²²⁰ Hobbes, *Leviathan*, chap. 23

²²¹ Kelsen, *General Theory of Law and State*, 161.

to maintain this unity, Rousseau remained evidently anxious about the difficulty of the task.²²²

While the pure theories of Hobbes and Rousseau may have been equally unlikely to be fully realized in practice, they were unrealizable in importantly different ways. Hobbesian formalist representation and legal-rational legitimacy could be maintained as a kind of juridical structure of the unity of the state even as the sociological unity was practically derived from other, more substantive traditional or ethical sources. Even if it factually misconstrued the unity of the state, Hobbes' theory could be maintained as a minimalist juridical structure with relatively little tension.²²³ In contrast, the unrealizability of Rousseau's "maximalist" theory of political unity could not be practically harmonized in the same way as Hobbes' minimalist one. Whereas Hobbes' absolutist representation effectively banished the exception, Rousseau's postulation of unity as immanent identity promises to unite force and *droit* while in practice constituting an irresolvable gap between them. At the same time, the postulated unity that would restore the rightful legal order authorizes the measures of force necessary to bring about its own existence. On this interpretation, unity as imminent identity, if taken seriously, approximates the structure of the state of exception itself, as the space between the normativity of the legal order and the measures necessary to realize that normative order.²²⁴

The anatomy of plebiscitarianism: Schmitt and Marx

²²² Most evidently in the famously enigmatic chapter "Du législateur," where Rousseau almost appears to admit the impossibility of such a republic, at least in modernity.

²²³ Koselleck, *Critique and Crisis*, *passim* 36.

²²⁴ As Schmitt describes it in the introduction of *Dictatorship*: "La dialectique interne du concept [of the state of exception in which dictatorship is employed] consiste en ceci que, par la dictature, est précisément niée la norme dont la domination doit être assurée dans la réalité historico-politique. Il peut donc exister une opposition entre la domination de la norme à réaliser et la méthode de sa réalisation... [dictatorship] consiste en la possibilité générale de séparer les normes du droit et les normes de réalisation du droit" (18). Hence while Rousseau's own discussion of dictatorship conforms to the classical "conservative" republican model, the modernist juridical structure of his theory points toward the new, revolutionary dictatorships that emerge in practice in the French Revolution. See Rousseau, IV.6. In Schmitt's terminology, the classical and renaissance "conservative" dictatorship is "commissarial," while modern revolutionary dictatorship is "sovereign."

So far, we've seen that what Schmitt identified as the two "poles" – identity and representation – are not simply opposite ways of constituting the state as a unity. They are also closely linked in their underlying conceptual architecture: while they represent opposite normative valuations, they *share* basic definitions of the state, sovereignty and representation itself.

We've also seen the very different ways in which the politics of emergencies appear in two conceptions. The project of Hobbesian representation is to *eliminate* the historically explosive politics of emergencies by monopolizing judgment in the sovereign, and dissolving exceptional powers such as the prerogative into the ordinary legal authority of the absolutist state. In contrast to this, Rousseau's foundation of unity in absolute identity, and the wide-ranging administrative and social means for achieving this extraordinarily powerful yet fragile social identity, set the stage for a new kind of state of exception. I want to briefly sketch an trajectory that emerges from this tension - plebiscitarianism and emergencies, by comparing the analyses of this phenomenon by Carl Schmitt and Karl Marx. As we shall see, while in many respects their interpretations are strikingly similar, they lead to opposite evaluations both of plebiscitarianism itself, and of the representative legislature as a potential site for the translation of social conflict into democratic politics.

One important consequence of Schmitt's idea, discussed in the previous chapter, of the constitution in the "absolute" sense is that it logically implied a distinct conception of emergency powers that can be *constitutionally valid* even if they are not authorized or even prohibited by particular constitutional statutes. By identifying the constitution with a concrete decision by the unified constituent power, Schmitt could simultaneously argue that the *constitution* is inviolable

and that constitutional *laws* may be suspended and even violated in a state of exception.²²⁵ For example, Schmitt's interpretation of Art. 48 of the Weimar constitution held that it authorizes the president to 'temporarily' violate constitutionally enshrined basic rights without "imping[ing] on the fundamental political decisions and the substance of the constitution." Indeed, the president's emergency powers stand

precisely in service of this constitution's preservation and creation. Therefore, it would be nonsensical to render every single constitutional law inviolable because the constitution is inviolable and to see in every single constitutional provision an insurmountable obstacle to the protection of the constitution in general. That meant in practice nothing other than placing the individual statute above the entirety of the political form of existence and to twist the meaning and purpose of the state of exception into its opposite.²²⁶

Hence on Schmitt's account emergency powers can be both unlimited by constitutional law and consistent with – indeed, required by – the inviolability of the constitution itself. In a sense, his discovery of the plebiscitary president allowed Schmitt to integrate the two contrasting theories of emergency powers discussed in the previous chapter. Of course, Schmitt's later theory is closer in implication to the *Political Theology* position insofar as he never returned to the *Dictatorship* view that emergency powers could be reconciled with the *Rechtsstaat*. But unlike *Political Theology*, his later theory relocated a more capacious view of emergency powers within the positive constitution, now distinguished from constitutional laws, and separated it at least theoretically from the constituent power itself – a distinction that the *Political Theology* formulation seems explicitly designed to undermine. In *Constitution Theory* (1928) and even more explicitly in *Der Hüter der Verfassung* (1931) and *Legality and Legitimacy* (1932), Schmitt

²²⁵ Schmitt, *Constitutional Theory*, 80

²²⁶ *ibid.*

continues to explore and refine the consequences of his theory of presidential emergency powers, acting as “commissioner” of the positive constitutional “decision” even if in violation of constitutional laws and provisions. To see how this works we need to return to Schmitt’s idea of the two “poles” of political unity with which I began this chapter, and take a closer look at Schmitt’s theory of representation itself.

Schmitt defines the *Rechtssaat* as a “mixed” constitution, because it simultaneously implies the constitution *of* a state, but itself “contains no state form.”²²⁷ As a limit to state power, the *Rechtssaat* is conceptually incomplete; it presupposes something outside itself, namely, the state. as we’ve seen, for Schmitt the state refers to the concrete existence of a political unity, the status of a people politically unified and existing as a single entity, which can be organized in different forms such as monarchy, aristocracy, etc. Schmitt identifies two principles or “structural elements” that statehood must presuppose in order for a people to exist as a political unity capable of action and decision. First, a relatively homogenous, self-present people can exist as a political unity on its own, through “unmediated self-identity.”²²⁸ In other words, the people constitute a unity without mediation, through their own direct self-presence. Secondly, among people who are not directly self-present in actual identity, political unity must be achieved through *representation*.

At the same time, *pace* Hobbes there can also be no state without some element of identity. Schmitt’s “absolute” concept of the constitution requires that the people constituting the state cannot be a pure juridification or legal fiction; they must in some way be “existing and present” in the public sphere.²²⁹ By “public” Schmitt appears to mean only the quality of commonality or generality among all members of the state, in contrast to private or economic

²²⁷ *ibid.*, 235.

²²⁸ *Ibid.*, 239

²²⁹ *ibid.*, 241

representation which can be secret and refer only to particular individuals. The entire people must be represented *as a unity*, an existential whole. The existential dimension refers to the fact that, as a minimum, the unity cannot be normative or hypothetical but must be concretely distinct from a mere aggregation or natural group that happens to live together.²³⁰

We can now see more clearly why Schmitt referred to the parliamentary *Rechtstaat* as a mixed constitution, incomplete in itself: it does not contain the concept of the political unity of the people. Schmitt can use this idea to give greater theoretical precision to his argument in *The Crisis of Parliamentary Democracy*; parliament could only claim to represent the political unity of the people under a historically contingent set of circumstances that tacitly presupposed an *aristocratic* state form that provided the sociological conditions for Burkean virtual representation. The expansion of suffrage, mass parties and the interpenetration of state and society have all undermined the ability of parliament to operate as a *public* representation of the whole. The expansion of democracy and the party system imposes the democratic *identity* principle on parliamentary representation, transforming parliamentarians into delegates represented distinct economic who engage in private deal-making with one another. “As soon as the conviction establishes itself that what occurs publicly in the context of the parliamentary activity has become only an empty formality and that the true decisions fall outside of this public sphere, parliament... is just not any longer the representative of the political unity of the people.”²³¹

If parliamentary elections correspond to an *aristocratic* and liberal rather than *democratic* state form, and if the advent of mass democracy undermines parliament’s claims to publicity, what institutional form best embodies the democratic identity principle in modern nation states?

²³⁰ *ibid.*, 242-3.

²³¹ *Ibid.*, 242. Also 250-2.

For Schmitt, it is not parliamentary elections but plebiscites, in which “the question presented is answered ‘yes’ or ‘no’” directly by the people, where “the principle of identity is realized to the fullest.”²³² In contrast to the weakened, ailing, indecisive and unprincipled parliament, the president appears to possess the ideal qualities for public representation in Schmitt’s sense. Before the emergence of bourgeois parliamentarism, the monarch was the preeminent non-democratic representative of the unity of the state. Happily, Schmitt tells us, the “position of the President is based on the monarchical element” translated into a republican form.²³³ Hence, since the president is *one* – as opposed to the antagonistic and pluralized assembly of parliament, this puts the president in the best position to embody the *representative* pole of political unity. Moreover, “there were also ideas of a direct democracy at work in the introduction of the presidential system.”²³⁴ Unlike the assemblage of parliamentarians who represent this or that interest, party or social class, the “President is elected by the entire German people,” thus giving him a direct plebiscitary appeal to the *identity* principle of political unity. Hence the president is superior to parliament in both *identity* and *representation* dimensions of political unity, which are together expressed in the plebiscitarian character of presidential elections. “The President, by contrast [to the “shifting and unreliable coalition” in parliament] has the confidence of the entire people not mediated by the medium of a parliament splintered into parties. This confidence, rather, is directly united in his person.”²³⁵

Schmitt’s insistence on the incomplete character of the *Rechtsstaat* had deep consequences. It must presuppose something outside itself: the state. Schmitt argued that the president is the *only* institution within the *Rechtsstaat* containing both structural elements of the

²³² Ibid., 240

²³³ Ibid., 316-7, 369.

²³⁴ Ibid., 369.

²³⁵ Schmitt, C. and J. Seitzer (2004). *Legality and legitimacy*. Durham, Duke University Press., 370

state. Since the Weimar constitution contains contradictory provisions and attempts to sidestep the question of a sovereign *decision* by the constitution power, the president – wielding emergency powers through Article 48 and backed by popular acclamation – is the exclusive and unique agent capable of declaring which parts of the constitution are the inviolable result of a *decision* of the constituent power, and which are incoherent, contradictory and dispensable.²³⁶

As the crises afflicting the Weimar republic deepened, Schmitt increasingly emphasized this link between presidentialism, plebiscitary legitimacy and emergencies, culminating in his *Legality and Legitimacy* (1932). There, Schmitt argues that presidential emergency powers provided a constitutional means for empowering the president over a dysfunctional parliament; since the parliament has itself undermined the distinction between laws and decrees, presidential decrees may play the role of laws.²³⁷ Emergency plebiscitary presidentialism is the only remaining means to cut through the legality/legitimacy knot and the irreconcilable duality of the constitution's commitment to *both* liberalism and democracy. If the demos participate democratically through the parliamentary party system, their interests will be represented by parties that at best result in pluralistic deadlock rather than popular unity and at worst splinter into outright enemies of the constitution itself. However, if the demos simply *acclaims* presidential emergency powers, it can be extraordinarily represented, embodied, materialized as an efficient active unity in the person of the president: "For the extraordinary lawmaker of Article 48 [i.e. the president legislating through emergency powers], the distinction between statute and statutory application, legislative and executive, is neither legally nor factually an obstacle. The extraordinary lawmaker combines

²³⁶ For Schmitt, it turns out to be the social democratic aspects of the constitution which turn out to be inessential and dispensable, and the separation of property from sovereignty which reflects the constitutional decision not to create a socialist republic. "the guarantee of property is meant as the recognition of a principle, not as the constitutional guarantee of a title without content, because there cannot be a bourgeois Rechtsstaat without private property, and the Weimar Constitution is intended as a *constitution* of the bourgeois-Rechtsstaat variety." *Ibid.*, 210. See also 218

²³⁷ *ibid.*, 83

both in his person.”²³⁸ Having concluded that parliament has forsaken its claim to be an organ of the democratic general will, Schmitt turned to the president, governing exclusively through emergency powers, as the privileged organ of democratic legitimacy through the plebiscitary principle of symbolically incarnating the popular sovereign.²³⁹ In this way, emergency powers have come full circle from a conservative institution to restore the constitutional *status quo ante*, to the mechanism for overthrowing the constitutional order in a full-fledged Caesarist coup d’état.

It is remarkable how closely Schmitt’s argument for plebiscitarian emergency powers tracks Marx’s famous analysis of the same phenomenon in *18th Brumaire of Louis Bonaparte*. Schmitt evidently followed Marx in locating the roots of plebiscitarianism in the modern state itself, of diagnosing the conditions of social and ideological conflict that prevent the legislature from being *both* democratic *and* a unified organ representing the general will, and in arguing that parliamentary norms of transparency and discussion under universal suffrage lead it to reflect social conflict and threaten to politicize the non-political social order. Unlike Schmitt, however, Marx sees the democratic legitimacy of parliament in its capacity to represent the people as concrete, conflicted groups within civil society. It’s value for Marx was in its potential to transform previously non-political, merely “social” questions *into* politics through the mechanism of agonistic representation. In contrast, he diagnosed plebiscitary representation of the president as a mode of depoliticization and passivity. Reconstructing these elements in Marx’s account can provide a powerful contrast between democratic and plebiscitary representation.

²³⁸ *ibid.*, 74.

²³⁹ *Ibid.*, 18

First, the constitution of the Third Republic divided power between a legislative assembly and a president, each popularly elected. Marx interprets the loci of tension in the constitution – ultimately inhering in the tension between legislative and executive power – as a reflection of the constitution’s contradictory origins in the February uprising, and the brutal repression of the defeated June insurrection under Cavaignac’s “commissarial dictatorship.” Hence the constitution embodied both the republican declaration of universal suffrage and the legislature as an organ expressing the national will, *and* the bedrock of military force and violence in the service of the protecting the social order.²⁴⁰ This contradictory commitment to both liberty and security emerged not only in its system of rights, but also in its structure of power. “Like Achilles,” the constitution was “vulnerable in one point, not in the heel, but in the head, or rather in the two heads in which it would up – the *Legislative Assembly*, on the one hand, the *President*, on the other.”²⁴¹ Both branches are to be elected through universal suffrage, but the constitution grants superiority to the legislature in that it can remove the president *constitutionally*, whereas the president has no such constitutional power.²⁴²

The *legal enshrined* advantage of the Assembly, however, is in fact a dangerous weakness that sets up legality and legitimacy in direct antagonism. The president’s weaker legal powers are balanced by his extra-legal strength. Not only does the president have unique control of the executive branch including all the sources of patronage, administrative control and, crucially, the armed forces. Compounding this material inequality is a further symbolic inequality between the assembly and president in their ability to represent the Nation.

²⁴⁰ “If the Constitution is subsequently put out of existence by bayonets, it must not be forgotten that it was likewise by bayonets, and these turned against the people, that it had to be protected in its mother’s womb and by bayonets that it had to be brought into existence,” Marx, K., F. Engels, et al. (2001). *The 18th Brumaire of Louis Bonaparte*. London, Electric Book Co., 34.

²⁴¹ *ibid.*, 31

²⁴² *ibid.*

constitution here abrogates itself once more by having the President elected by all Frenchmen through direct suffrage. While the votes of France are split up among the seven hundred and fifty members of the National Assembly, they are here, on the contrary, concentrated on a single individual. While each separate representative of the people represents only this or that party, this or that town, this or that bridgehead, or even only the mere necessity of electing someone as the seven hundred and fiftieth, without examining too closely either the cause or the man, he is the elect of the nation and the act of his election is the trump that the sovereign people plays once every four years. The elected National Assembly stands in a metaphysical relation, but the elected President in a personal relation, to the nation. The National Assembly, indeed, exhibits in its individual representatives the manifold aspects of the national spirit, but in the President this national spirit finds its incarnation. As against the Assembly, he possesses a sort of divine right; he is President by the grace of the people.²⁴³

In interpreting this passage it's useful to keep in mind Marx's earlier critique of political theology in "On the Jewish Question." In that essay, Marx argued that the emancipation of the secular liberal state from civil society should be seen as "the political realization of Christianity."²⁴⁴ The universal, abstract principles of the liberal state at the same time sever the state from concrete realm of social existence, and define all concrete particularity as non-political. Likewise, Marx seems to regard the very idea of the "unity" of the Nation as a "spiritualized" abstraction that can only be presented by obscuring and repressing the material, concrete sources of conflict and division from political expression.²⁴⁵ Interestingly, parliament plays a much interesting role, as a potential forum for the politicization of social conflicts , than

²⁴³ *ibid.*, 32-3

²⁴⁴ *ibid.*, 36.

²⁴⁵ "On the Jewish Question" in Marx, K. (1992). *Early writings*. Harmondsworth ; New York, Penguin in association with New Left Review.

Marx every supposed in “On the Jewish Question.” In fact, both inter- and intra- class conflict appear almost immediately as partisan divisions within parliament, undermining its claims to mediate social plurality and represent the unified general will.

With this in mind, we can specify more concretely the nature of plebiscitary legitimacy. Whereas social and ideological divisions of the electorate reemerge in the assembly, the singular figure of the president can incarnate the abstract unity of the nation in his own person. The nation, in terms of “On the Jewish Question,” can precisely be characterized as a transcendent, theological form. The “divine right” of the president, his legitimacy to rule “by grace of the people,” then, is a form of institutionalized political theology at a time when the legitimacy of the monarch was irrevocably stripped of any corresponding claims to transcendent authority. The mechanism of universal suffrage, in conjunction with the president’s control over the executive forces of the state, work together to give a unified, personal, material form to this political-theological relationship. Marx traces the progressive abandonment of the Assembly’s claim to represent the Nation, not in its metaphysical unity but in its actual socially conflicted and divided state alongside its progressive disavowal of the institutions of state power to the president, from the *Montagne*’s abandoning of the June insurrection, to the shift in loyalty of the national guard, to the last nail in the republic’s coffin, the abolition of unrestricted suffrage by the party of order.²⁴⁶ With this last measure, the Assembly erased its last sources of democratic legitimacy, confirming the fact that “it had transformed itself from the freely elected representatives of the people into the usurpatory parliament of a class; it acknowledged once more that it had itself cut in two the muscles which connected the parliamentary head with the body of the nation.”²⁴⁷ As these passages suggest, the Assembly may have some chance at counteracting the president’s

²⁴⁶ Marx, *18th Brumaire*, 52, 56, 106.

²⁴⁷ *Ibid.*, 113.

plebiscitary legitimacy by abandoning the abstraction of the unified nation and representing the ideological and social plurality of the actual society in all of its contradictory forms. By abandoning these, the legislature deprived itself of any democratic legitimacy with which it could counter-act that of the president and is forced to fall back upon *legality* as its sole source of legitimacy. By contrast, the more the Assembly is reduced to unsightly squabbling and legalistic maneuvers, the more the President's political-theological incarnation of national unity is reinforced. The *va-banque* stakes of the separation of powers become clear in this structure: without democratic legitimacy claims of its own, the Assembly's weapons against the executive are reduced to the legalistic counter-majoritarianism expressed in the Amendment rule²⁴⁸ and its ability to constitutionally remove the President.²⁴⁹ Both of these, of course, involve an inferior source of legitimacy removing a superior source; an unlikely prospect. Meanwhile, the President, faced with legal limitations to his term, has clear incentives to marshal the superior legitimacy and physical power at his disposal against its formal, legal restrictions. Hence Marx shows that Bonaparte employed plebiscitarian tactics of countering the legalist procedures of the Assembly by appealing over its heads directly to the "unorganized popular masses" against their parliamentary representatives.²⁵⁰

Plebiscitarianism and Emergency Institutions

The strong links between plebiscitarianism leadership, popular sovereignty and emergencies are a core theme of the recent emergency powers literature, particularly in Bruce Ackerman's work on extra-constitutional change and popular sovereignty. Ackerman's intention in his magisterial *We the People* was both a historical interpretation of processes of extra-legal constitutional

²⁴⁸ Ibid., 33

²⁴⁹ Ibid., 31

²⁵⁰ Ibid., 38-9.

change, and a normative reconstruction of these moments as instantiations of popular sovereignty and the democratic constituent power. But as Ackerman acknowledges, albeit briefly and in passing, the three great moments of the constituent power he identifies – the Founding, Reconstruction and the New Deal –also include the most dramatic instances of emergency powers and plebiscitarian leadership.²⁵¹ In effect, alongside Ackerman’s optimistic narrative of dualist democracy, one can reconstruct a darker counter-story of how emergencies give rise to plebiscitarian leaders, and strengthen their ability to overpower constitutional limitations and institutional oppositions, and claiming electoral mandates to personify the unified nation as an unbounded constituent power. Neither of these stories, of course, is complete on its own, but in subsequent works Ackerman gave increasing attention to the second counter-narrative that went almost completely unmentioned in *We the People*. After exploring the rise of the plebiscitarian presidency in *The Failures of the Founding Father*, Ackerman turned his attention exclusively to the pathological form of plebiscitarianism that arises in response to emergencies. In *Before the Next Attack*, Ackerman proposes a sophisticated institutional framework that would legally authorize special emergency powers to the executive after an emergency declaration by the legislature, and would make executive emergency powers subject to a “counter-majoritarian escalator” of regular legislative re-authorizations requiring larger and larger supermajorities.²⁵²

Ackerman’s more general argument is that enshrining emergency powers within the constitution, giving them legal authorization and subjecting them to the separation of powers are

²⁵¹ One might exclude the Founding from this characterization; it certainly incorporated a strong argument about the existence of a dire emergency, but since it was explicitly a project to establish a new constitution rather than restore an old one, it does not straightforwardly conform to the commissarial model of emergency powers. And while one can certainly identify plebiscitarian dimensions of the Framers’ project – especially in James Wilson’s theories of the constituent power – the ratification/convention model was importantly distinct from the extraordinary representatives of the nation and sovereign assembly developed just a few years later in the French Revolution. See Andrew Arato, *Civil Society, Constitution, Legitimacy*.

²⁵² Ackerman, *Before the Next Attack*

the best way to defuse the extra-legal and authoritarian temptations that go along with the plebiscitarian legitimacy presidents enjoy during wars and emergencies.

There is something about the presidency that loves war-talk. Even at its most metaphorical, martial rhetoric allows the President to invoke his special mystique as Commander in Chief, calling the public to sacrifice greatly for the good of the nation. Perhaps the clarion call to pseudo-war is just the thing the President needs to ram an initiative through a reluctant Congress. Perhaps it provides rhetorical cover for unilateral actions of questionable legality... *The Emergency Constitution* aims to provide a new framework for controlling this presidential dynamic in its present boom cycle.²⁵³

Ensnaring the president within a legally authorized emergency provisions and procedures will help block the plebiscitarian rhetoric of war, personification and extra-legalism.

One of Ackerman's main antagonists in this debate is Oren Gross, who proposes a model of emergency powers that stands in diametrical opposition to Ackerman's constitutional solution. Marshalling a great deal of evidence from the constitutional histories of a variety of countries, Gross argues that the "assumption of separation" that underlies views such as Ackerman's that emergency powers can be constitutionalized yet safely contained and delimited within watertight provisions is untenable in practice. The history of constitutionalized emergency provisions, according to Gross, suggests that the illusion of separation breaks down as extraordinary powers become authorized and therefore normalized, and politicians become increasingly tempted to resort to them as instruments of ordinary governance.²⁵⁴ For Gross, the best model for preventing the normalization and routine use of emergency powers is to deprive them of any constitutional authorization and insist that they remain strictly extra-legal. In his view, if an executive judges

²⁵³ Ackerman, "This is not a War," 1872.

²⁵⁴ Gross, *Law in a Time of Crisis*

that some extraordinary emergency requires measures that are ordinarily illegal, she should do what she deems necessary, frankly acknowledge the illegality of her actions, and submit to the ex post judgment of other institutions or to the public at large to determine whether the illegal actions were legitimate or not.²⁵⁵

Gross' "extra-legal measures model" has been roundly criticized for overlooking precisely the plebiscitarian dynamic that Ackerman is concerned with.²⁵⁶ Gross and others sharing his view have responded by reemphasizing concerns that legally authorized emergency powers lead to acclimating and accustomizing a population to emergency rule, and so the debate continues. Rather than supporting one side over the other, the approach I have taken of sketching these "arenas" of emergency politics allows us to identify and clarify a common set of problems shared by both sides. The internal tension between the identity and representation poles of the modern state creates an elective affinity between external "emergency" threats and the plebiscitarian mode of constituting the political unity of the people. This is the arena out of which this debate emerges. Gross, rightly, is concerned with the way in which the impersonal, public character of institutions and offices of the state allow them to be exercised in a way that undermines substantive ends such as democracy and the rule of law.²⁵⁷ His proposal turns to the clear, harsh light of extra-legality as a way of saving substantive political judgment about emergency powers from the diversions legal formalism and focusing it on the substantive problem of the legitimacy or illegitimacy of the emergency measures. For him, the impersonal juridical pole of the state on its own is dangerously susceptible to accretions of discretionary power. Ackerman, attentive to the combustible potential of plebiscitarian crisis leadership to

²⁵⁵ Gross, "Chaos and Rules," 187-8.

²⁵⁶ Scheuerman, W. (2006). "Survey Article: Emergency Powers and the Rule of Law After 9/11." *Journal of Political Philosophy* 14(1).; 265; Ackerman, *Before the Next Attack*; Arato, A. (2002). "The Bush Tribunals and the Specter of Dictatorship." *Constellations* 9(4).

²⁵⁷ Gross, *Law in a Time of Crisis*

claim to embody the identity of the sovereign people, wants to proceduralize, desubstantialize and depersonalize the holder of emergency powers.

Hence while the Ackerman/Gross debate is generally cast in the antithetical terms of legality vs. extra-legality, in another sense it could be redescribed as responding to two different pathologies of emergency powers that are both inscribed within this key tension of democracy and the modern state. Underlying the question ‘should emergency powers be located inside or outside the constitution?’ is a common concern about the twin pathologies of formalization of discretionary emergency power and the personalization of discretionary emergency power. This perspective helps move beyond the oddly truncated conception shared by Gross and Ackerman of institutions and the rule of law oddly abstracted from the dynamics of democratic politics.

Such a perspective shifts the theoretical focus from an exclusive concern with constitutional forms and procedures to the mutually constitutive interrelations between constitutional forms and the extra-institutional dynamics of legitimacy, will-formation and judgment within the political unity constituted by the state. From the same perspective we can also move beyond Ackerman’s blunt factual assertion of the ubiquity of plebiscitarianism and presidential “war talk” and probe more deeply into the political dynamics that allow this expansion of plebiscitarian emergency rhetoric to dominate recent political discourse. Expanding the frame from institutional design *tout court* to the interaction between institutions and the political forces that animate and shape them can yield a more effective theoretical framework for interpreting – rather than just presupposing – the sources of emergency institutional pathologies such as legislative acquiescence, judicial accommodation and popular passivity in the face of presidential “war talk.” In chapter 6 of this dissertation I will take up this question in detail and argue that the recent expansion of presidential war talk represents a distinctive form of

plebiscitarianism that is unacknowledged, and hence unresolved, in Ackerman's proposal. For now, though, I only want to suggest the way in which a more capacious framework can help move beyond the limitations of the legality/extra-legality debate and allow us to see the function of emergency institutions as an arena for democratic politics.

III. Security of and against the State

La liberté politique, dans un citoyen, est cette tranquillité d'esprit qui provient de l'opinion que chacun a de sa sûreté; et, pour qu'on ait cette liberté, il faut que le gouvernement soit tel qu'un citoyen ne puisse pas craindre un autre citoyen.

--Montesquieu, *De l'esprit des lois* XI.6

While the first two tensions I have identified derived from early modern republicanism and developed through the intertwining strands of modern democratic and republican politics, the third tension regarding security and the modern state can associated more directly with the liberal tradition. It derives from a core basis of the legitimacy of the modern state in its capacity to provide individual security. At the same time, the means with which the state provides security may also pose a threat to individual security. Or, to restate the tension in a different way, "Rights are rights against the state; the state makes rights possible."²⁵⁸ This tension is distinct from the

²⁵⁸De Ruggiero, G. (1959). The history of European liberalism. Boston,, Beacon Press., 367

issue in section one of liberty and *raison d'état*, since that section concerned the state's capacity to preserve the *collective* liberty of a self-governing community, whereas here I want to focus on the state's relation to the security of the individual as an arena for emergency politics. The obvious starting point for this theme is Thomas Hobbes. Hobbes, as we've seen, adopts a radically individualist perspective, grounding the legitimacy of the state in the authorization of each subject to be represented by the sovereign, for the sake of his security.²⁵⁹ But the theoretical premise of Hobbes' argument derives from his nominalist skepticism; for Hobbes, neither truth nor goodness derive from any "essence" in the world but are purely conventional.²⁶⁰ Truth is a product of language, and the good is determined by my desires and aversions. Without the authority of the sovereign representative to declare and impose common definitions, we cannot possibly arrive at any common understanding of, say, stable expectations for future action coordination or shared ethical norms, and hence, life will be nasty, brutish, short. Nominalism, however, provides a deeper theoretical basis for the primacy of security. If the good is simply a product of individual desires and aversions, and if desires and aversions differ from individual to individual, no substantive idea of the good can provide a basis for universal consensus, since these by definition refer back to what is good for particular individuals.

Hobbes' ethical nominalism does, however, provide a basis for a minimalist, "deontological" basis of universal consent that transcends the possibility of conflict and disagreement. If the condition of possibility for *any* individuals' particular conception of the

²⁵⁹ Hobbes, *Leviathan*, the basis of security is emphasized throughout; see ch. 18, 120-1 for examples in this fundamental passage.

²⁶⁰ Ibid., "For *True* and *False* are attributes of Speech, not of Things," ch. 4, 27. "But whatsoever is the object of any mans Appetite or Desire; that is it, which he for his part calleth *Good*: And the object of his Hate, and Aversion, *Evill*... For the words of Good, Evill, and Contemptible, are ever used with relation of the person that useth them: There being nothing simply and absolutely so; nor any common Rule of Good and Evill, to be taken from the nature of the objects themselves; but from the Person of the man (where there is no Common-wealth;) or, (in a Common-wealth,) from the Person that representeth it..." ch. 6, 39. Further, "the Felicity of this life, consisteth not in the repose of a mind satisfied. For there is no such *Finis ultimus*, (utmost ayme,) nor *Summum Bonum* (greatest Good,)..." ch. 11, 70.

good is their own desires, and therefore the preservation of each individual's own life, then this logical priority of self-preservation for each individual necessarily constitutes a universal principle of reason, or, as Hobbes calls it, the first natural law.²⁶¹ From this it also follows that there is an equally universal "blameless liberty," or natural right, to the same. Hobbes' state presupposes not only the priority of security, but grounds this priority outside any possible political contestation caused by our epistemic diversity. By showing that each individual's desire is the condition of possibility for any imaginable external good, and individual death therefore negates that good, Hobbes portrays a political and ethical universe in which the very idea of something worth dying for is a logical absurdity.²⁶² This argument, along with the dramatization of civil war in the state of nature, was likely to have appealed to a European readership traumatized by the political violence of the Wars of Religion and especially the English Civil War. Hence by acknowledging pervasive political disagreement and incorporating it into his skeptical, atomistic epistemology, the priority of security plays a powerfully depoliticizing role, establishing itself as a uniquely uncontestable foundational principle. It is only on the basis of this deontological principle can all individuals, no matter what their substantive conception of the good, rationally allow themselves to be represented by the sovereign, on the condition that everyone else does also. Then the first prong of Hobbes' nominalist individualism, requiring the artificial person of the state for the possibility of unity, works in conjunction with the second prong, placing security at the foundation of the political relationship expressed by the state. In this sense, security promises to offer an uncontested baseline, a principle for grounding the political that, as a universal law of nature, also transcends politics. Indeed, so committed was Hobbes to this supra-political principle that he was willing to acknowledge it as the limit of the

²⁶¹ Ibid., ch. 16, 111.

²⁶² Although he does not put it in these terms, the depoliticizing function of fear in Hobbes is analyzed by Corey Robins, *Fear*, 31-51.

sovereign's absolute authority. Since the means to preserve one's life from immanent threat cannot be alienated, subjects have no obligation to obey commands of the sovereign that will lead to immediate death, nor is there any obligation to sovereign's who have lost their capacity to provide basic security.²⁶³

Whereas the artificial person of the state, as we saw above, provided both an epochal reformulation and an oddly ethereal and fragile foundation for the unity of the state, Hobbesian security provided both a basis for and an inexhaustible source of critique of the absolutist state. Whatever the validity of Hobbes' deductive argument for absolute sovereignty, the privatized, fearful, self-interest seeking individual he theorized proved to be a more disloyal than Hobbes imagined, equally inclined to regard the state as a threat to rather than guarantor of his security. As John Locke memorably put it:

for if it be asked, what security, what fence is there, in such [an absolutist] state, against the violence and oppression of this absolute ruler? ... Betwixt subject and subject, they will grant, there must be measures, laws, and judges, for their mutual peace and security: but as for the ruler he ought to be absolute, and is above all such circumstances; because he has power to do more hurt and wrong, it is right when he does it. ... as if when men quitting the state of nature entered into society, they agreed that all of them but one should be under the restraint of laws, but that he should still retain all the liberty of the state of nature, increased with power, and made licentious by impunity. This is to think, that men are so foolish, that they take care to avoid what mischiefs may be done them by polecats, or foxes; but are content, nay think it safety, to be devoured by lions.²⁶⁴

Locke's objection is a familiar one, even in recent debates, but it is important to see that Locke is not simply correcting a theoretical error on Hobbes' part but participating in an ongoing

²⁶³ *Leviathan*, Ch. 21.

²⁶⁴ Locke, *Second Treatise*, §93.

articulation and negotiation of a central tension in modern statehood: the legitimacy of the state in Locke's *Second Treatise*, after all, is to a large extent grounded on its ability to provide *security* to persons and property.²⁶⁵ And as his discussion of Federative and Prerogative power illustrates, Locke was acutely aware of the necessary limitations imposed by the state system itself on his general principle that coercive power of the state rests on rational consent.²⁶⁶

Perhaps no one was as sensitive to the complex tension of security's inscription in the modern state than the Baron de Montesquieu. Montesquieu, famously, defined liberty as "that tranquility of spirit which comes from the opinion each one has of his security," which, as Montesquieu makes clear and at length, requires both the unity of coercive state power and its constitutional limitation and division.²⁶⁷ Absolute tranquility as an end in itself is characteristic of despotism, not constitutionalism.²⁶⁸ At the same time, in the same chapter devoted to the English constitution as a model, Montesquieu approvingly cites emergency powers that ensure that the state capable of providing individual security can provide for its own security as well. As Montesquieu relates, when parliament detected a "secret conspiracy" threatening the state, it revoke the trial rights of those suspected and authorize the arrest and detain them without trial, so the citizens "ne perdraient leur liberté pour un temps que pour la conserver pour toujours."²⁶⁹ Emergency powers, as Hume also argued, may be necessary for individual security, but can just as easily threaten them. Benjamin Constant argued emphatically for the futility of emergency powers as a means of protecting individual security.

²⁶⁵ Cf ... Of course this more "Nozickean" reading of Locke is not *exhaustively* true, since Locke also has a conception of reason that links together freedom, the law and rationality. But even if we give greater emphasis to this more 'republican' dimension in Locke, security indubitably plays a central if not exhaustive role in the legitimacy of the state.

²⁶⁶ cf. ... I discuss this issue in Locke at length in chapter II of this dissertation.

²⁶⁷ XI.6

²⁶⁸ V.14.

²⁶⁹ XI.6

When a regular government resorts to arbitrary measures, it sacrifices the very aim of its existence to the means which it adopts to preserve this. Why do we wish authority to repress those who attack our properties our liberty, our life? Because we want to be assured of their enjoyment. But if our fortune may be destroyed, our liberty threatened, our life disturbed by arbitrary power, what good shall we derive from the protection of authority?²⁷⁰

This double-edge of security illustrates the third constitutive tension within the modern state whose roots we saw Hobbes' deduction of security as the single uncontested point of agreement amongst conflicting political ideologies. Security, as Ian Loader and Neil Walker put it, is both a problem *for* and a problem *of* the state.²⁷¹ In other words, if the *raison d'être* of the state is to provide security for individuals, this leads to the concentration of coercive power and the evisceration of limits to that power, and therefore to the creation of the state as a *threat* as well as a guarantor of individual security. With Locke and Montesquieu, we arrive at a recognizable theory of emergency powers as institutional mediations of this tension. I will return to this dimension in the second section, but for now it is sufficient to state the obvious point that emergency powers hardly resolved the dialectic of security and the state but provided a further institutional locus for articulating it.

Security as Baseline

As we've seen, the roots of security as an apolitical or uncontested baseline can be traced all the way back to Hobbes. As we've seen, Hobbes thought that the security of each individual's life constituted a unique baseline of universal rational consent beneath the sound and fury of conflicting political passions, ideals and rhetoric. Security constitutes a non-political foundation of politics; an uncontested Archimedean point upon which a political superstructure can be

²⁷⁰ Constant, "The Spirit of Usurpation and Conquest," in *Constant: Political Writings*, 134.

²⁷¹ Loader and Walker, *Civilizing Security*, 11.

built, allowing individuals to chase after their own individual goods in the spaces of negative freedom carved out by positive law. Similarly, the “balancing” theorists such as Posner and Vermeule see the quantification of security theory in utility theory as a rational, non-”subjective” way of arriving at an optimal degree of security through formal modeling. There too, the idea is that optimal balance of liberty and security does not presuppose any particular substantial idea of the good – liberty leaves the individual free to pursue her own particular goods, and security ensures that she will be physically unharmed and unthreatened in doing so, no more.²⁷² While the particular “balance” arrived at by Posner and Vermeule make them more openly sympathetic with Schmitt than many contemporary liberals, we’ve seen that the idea of a balance between liberty and security is, far from endogenous to the liberal tradition, one of its core elements. Liberalism distinguished itself from Hobbesian absolutism through its commitment to harmonizing the freedom of each with the equal freedom of everyone else. But this end absolutely presupposed state power, not only in the sense of instantiating a condition of “Right” or lawfulness, but also in the more elementary sense that security from violations of one’s person and property is an absolute precondition for individual autonomy and political freedom. The liberal state, in all its variations, must be both a sovereign guarantor of security *and* a guarantor of freedom. One way in which liberals faced this dilemma is through the framework of balance,²⁷³ and in this sense the utility maximizers are following squarely in the footsteps of Hume and Bentham by engaging in this quintessential liberal endeavor.

At the same time, the discomfort with the idea of a balance has equally deep roots in the concept of the liberal state. One such root lies in the elements of the social contract tradition that,

²⁷² Posner, E. A., A. Vermeule, et al. (2007). *Terror in the balance security, liberty, and the courts*. New York, Oxford University Press.

²⁷³ Loader and Walker, *Civilizing Security*, 53.

by grounding all political authority on a generalization of the rational will, conceive of an internal relationship between legitimate authority, reason and liberty that excludes any trade-offs or compromises on the priority of rational freedom under law.²⁷⁴ This perspective of the priority or special status of liberty – expressed in a variety of contemporary frameworks such as “rights as trumps,” “lexical priority,” “side constraints,” etc. – sees the prospect of trading away liberty for some other social gains as destructive of the rational foundation of legitimate authority, and rejects the utilitarian aggregative basis of the balancing theory as itself an illiberal violation of the principles of political and civic equality, and so on.²⁷⁵

Judith Shklar provides another example of security as an uncontested baseline. Her defense of liberalism explicitly eschews all moral perfectionist and comprehensive foundationalism as at best distracting and inconclusive and at worst offering utopian visions of a “new man” or “human emancipation” that fuelled the worst of the twentieth century’s excesses.²⁷⁶ Shklar admonishes such authors that, by reasoning abstractly from first principles regardless of their practical import, they display a contempt for ordinary experience and actual political conditions and dangers faced by actual individuals, many of whom cannot be presumed to accept the first principles and expectations of radical political change entailed by the foundationalists.²⁷⁷ In contrast, the liberalism of fear “does not, to be sure, offer a *summum bonum* toward which all political agents should strive, but it certainly does begin with a *summum malum*, which all of us know and would avoid if only we could. That evil is cruelty and the fear it inspires, and the very

²⁷⁴ Locke, Rousseau, Kant, for example.

²⁷⁵ These criticisms are lucidly presented in Waldron, J. (2003). “Security and Liberty: The Image of Balance.” *Journal of Political Philosophy* 11(2).

²⁷⁶ Striking an explicitly Hobbesian note (from which she derives anti-Hobbesian conclusions), Shklar argues that dying for a cause is “an act of supererogation which falls outside the realm of politics... Politically it has usually served as an excuse for orgies of destruction. Need one remind anyone of that truly ennobling cry: “Viva la muerte!” – and the regime it ushered in?” “Liberalism of Fear” in Shklar, J. N. and S. Hoffmann (1998). *Political thought and political thinkers*. Chicago, University of Chicago Press., (14).

²⁷⁷ Ibid., 15.

fear of fear itself.”²⁷⁸ Unlike comprehensive rational principles, fear expresses a more intimate and genuinely shared abhorrence of cruelty and suffering, a foundation based not on abstract theory but “on common and immediate experiences” and “undeniable actualities” of real men and women.²⁷⁹

Fear is “a first principle, an act of moral intuition based on ample observation, on which liberalism can be built, especially at present. Because the fear of systematic cruelty is so universal, moral claims based its prohibition have an immediate appeal and can gain recognition without much argument.”²⁸⁰

The liberalism of fear, then, focuses on our security against the ever-present possibility of cruelty that is implied in the very existence of the state. Shklar is no anarchist or libertarian: the coercive apparatus of the state is indubitably necessary to protect the weak against the domination of the powerful. And for this very reason, “given the inevitability of that inequality of military, police, and persuasive power which is called government, there is evidently always much to be afraid of.”²⁸¹ Focused on “damage control” rather than abstract ideals, liberalism should focus on maintaining our security from the state by zealously limiting, restricting and scrutinizing the necessary evil of state power.

As the passages quoted above show, security as fear is also Shklar’s attempt to ground liberalism in an immediately shared, self-evident and intuitive principle that can be elevated and generalized above the political fray of conflicting theoretical, ideological and rhetorical appeals. In this respect, like Hobbes and Posner, Shklar’s security as fear sees in security a principle insulated from political contestation, offering a supra-political foundation for politics. And it is

²⁷⁸ Ibid., 10-11.

²⁷⁹ Ibid., 13, 9.

²⁸⁰ Ibid., 11

²⁸¹ *ibid.*, 9

precisely at this level where her project seems most questionable. It is far from clear whether the affective, experiential intuition of fear provides as stable and coherent a basis for reviving a liberalism that Shklar saw had emerged from the tumultuous 1960s as vulnerable and discredited.

In fact, security as the fear of cruelty is considerably more mutable and polyvalent than Shklar assumed. More importantly, she was wrong to regard the moral intuition of our abhorrence to cruelty as a supra-political Archimedean point of agreement transcending rhetoric or contestation. The subsequent history of the liberalism of fear illustrates both of these erroneous assumptions. Writing at the end of the Cold War, Shklar reasonably assumed that the focus of security as fear would be security from the state's capacity for cruelty and abuse. As Corey Robins points out, as waves of ethnic cleansing and genocide entered political consciousness after the cold war, Shklarian liberals began to identify the collapse of state power rather than its aggrandizement as the principle source subjecting the weak to cruelty, violence and terror. The specter of "state failure" rather than state success became the *summum malum* of the defenders of security of the weak against fear of cruelty and violence. Self-identified liberals of fear such as Michael Ignatieff and Samantha Powers defended an ironically state-aggrandizing form of military humanism on explicitly Shklarian, cosmopolitan grounds of security as fear.²⁸²

On the other hand, the terrorist attacks in the United States and Europe in the 2000s propelled another ironic inversion of security as fear. While the political threat represented by groups such as Al Qaeda remain much in debate, such attacks were certainly sufficient to instill fear, as an "undeniable actuality," of being victimized by the intentional, "cruel" violence in a terrorist attack in the "common and immediate experiences" of millions of people, especially in the United States. In this case too, the undeniable experience of fear and abhorrence of the attack's

²⁸² Robins, *Fear*, 149-55.

cruelty led to an inversion of Shklar's security against the state; the state again became the agent of security against fear, and legitimated its aggrandizement through fear.

The point of these examples is not, of course, that Shklar's argument leads inevitably to these permutations (it doesn't), or that Shklar herself would have endorsed them. The point is simply that Shklar was mistaken to regard fear of cruelty as an immediately available, uncontested baseline that unilaterally led to the kinds of political concerns she wished to combat. On the contrary, humanitarian intervention and the War on Terror both demonstrate that security as fear is an arena of political contestation and saturated with rhetoric through and through, and is essentially polyvalent in terms of the political outcomes it supports. Shklar's dystopian skepticism and her emphasis on protecting the weak from cruelty were supposed to ground a baseline political morality apart from the pervasive disagreement and deep uncertainty about more positive political ideals. But like Posner and Hobbes, Shklar's attempt to depoliticize security by detaching it from its role in any positive normative vision merely opens security to politicization as an end in itself, fueling a kind of security politics that can easily undermine rather than reinforce Shklar's liberal commitments.

Democratic Security?

According to John Dewey's quixotic strand of "radical liberal democracy," one of traditional liberalism's greatest failures was its insufficient attention to the interrelation between liberty and security.²⁸³ Among these critics was John Dewey, who wrote in his 1937 essay "The Future of Democracy,"

²⁸³ The link between security and liberty was insisted upon by many of the most reformist public intellectuals of the time. As John A. Ryan, an important Catholic public intellectual and New Dealer, put it, "Our democracy finds itself... in a new age where not political freedom but social and industrial freedom is the most insistent cry." Under

Whether or not security and liberty are incompatible for the individual is a question that depends upon the definition of the terms “security” and “freedom.” As general terms, they seem to be too vague and ambiguous to permit of intelligent consideration. If “security” is limited to economic safety, it certainly is incompatible with the kind of laissez-faire freedom that has developed in modern highly industrialized countries. If freedom is combined with a reasonable amount of equality and security is taken to mean cultural and moral security and also material safety, I do not think that security is compatible with anything but freedom.²⁸⁴

In *Liberalism and Social Action*, published two years earlier, Dewey diagnosed the crisis of liberalism stemming from the emptiness of formal political rights and its inability to incorporate “the social conditions of freedom.” “Today,” Dewey wrote, liberty must be redefined and expanded to include “liberation from material insecurity and from the coercions and repressions that prevent multitudes from participation in the vast cultural resources that are at hand.”²⁸⁵ As a result of the failure of liberals to do this, liberalism was left defenseless to combat or even diagnose the way in which the pervasive insecurity created by industrial capitalism was undermining its own core values, namely “liberty, the development of the inherent capacities of individuals made possible through liberty, and the central role of free intelligence in inquiry, discussion and expression.”²⁸⁶

We’ve seen from our discussion of Toqueville a pathological tendency of security to dominating political discourse and atomize the terms by which it is experienced. One potential

his influence, the Church reversed its antipathy to state intervention and demanded a government guarantee of continuous employment and “a decent livelihood and adequate security” for all. quoted in Foner, 196

²⁸⁴ Dewey, “The Future of Democracy,” *Dewey: The Later Works*, ed. Jo Ann Boydston and John McDermott. (Southern Illinois University Press, 1987). vol. XI, 532.

²⁸⁵ Dewey, J. (1935). *Liberalism and social action*. New York,, G. P. Putnam's sons.

²⁸⁶ Dewey, *Liberalism and Social Action*, vol. XI, 25

way of combating this tendency is to reengage the broader and more capacious political valiancy of security itself. In this sense, Dewey's thoughts on security may be a vitally relevant during the War on Terror that the material deprivation, impersonal domination and stifling of individual agency and creativity that stem from economic and social inequalities can be considered at least as important sources of insecurity as fear of a terrorist attack. This is not to suggest the two sources of insecurity are interchangeable, or equivalent. Rather, the intersubjective nature of security implies that the most politically urgent sources and definitions of insecurity are bound up with the articulation of a common social identity and the construction of a set of political priorities and objectives. The rhetorical potency of different conceptions of security derives from this collective aspect; security as an intersubjective experience implies that *we* are commonly threatened by terrorist attacks or crime or economic instability. This is the reason why efforts to point to out that individuals are statistically more likely to die in a traffic accident than in a terrorist attacks fail to resonate. It may be true, but *we* are not collectively made insecure by traffic accidents, whereas we are by terrorist attacks. Security threats, as we've seen, are not bare statistical probabilities but are constituted through the formation of a collective identity and the articulation of a political project. This may be one reason for the fact that certain kinds of death or injury at the hands of certain assailants – whether it is the state or terrorists – are so much more politically relevant than others, even if they are overwhelmingly less frequent, because they resonate with political identities and attachments at various levels of depth. Hence, “changing the subject” of security is not a matter of weighing the lower threat of being blown up in a terrorist attack vs. the greater threat of losing my job. It involves arguing at the level in which a particular concept of security expresses fundamental political projects, normative commitments and shared identity within a broad and unfocused field of risk and uncertainty.

At the level of identity, another pathology of security politics involves the propensity of shaping and channeling this identity-constituting dimension into ascriptive forms of militarism and nationalism that identifies the specter of alien and foreign terrorist as the chief enemy of *our* security. But as Dewey's discussion shows, the identity constituting dimension of security are not necessarily constrained to nationalism and chauvinism; Dewey's case was an attempt to construct a broader and more inclusive democratic public by focusing on the insecurity of irrational and unconstrained market forces that obstruct individual autonomy through fear, uncertainty and deprivation.

Far from a simple reshuffling of statistical probabilities of risk, "changing the subject" of security is analogous to, and probably just as difficult and unpredictable as, any other major ideological shift and realignment. On a more immediate and modest level however, attempts to expand, question and redefine the meaning of security still play an important political role in maintaining a degree of contestability and reflexivity in security, even if they fall far short of a hegemonic realignment. An interesting recent example of this in the US was the immigrant rights protests in April of 2006, culminating in May 1 when millions of people participated in rallies, boycotts, and strikes to demand legal equality. The mobilization had the effect of bursting into a monotone political discourse that had been dominated by discussions of terrorism, national and domestic security for the previous 5 years.

Of course, the movement failed even to achieve the moderate immigration reform then contemplated by Congress, and certainly failed in a larger sense to transform the dominant conception of security in on fell swoop. But, by highlighting a totally different condition of insecurity imposed on undocumented immigrants into the public sphere, the movement arguably had a significant opening effect on public discourse, vividly highlighting the limitations of an

idea of political membership centered around security from terrorism. By forcing a set of political claims to inclusiveness and strongly at odds with the prevailing discourse of security, this movement and others like it likely played an important role in defusing and displacing the emergency climate. At that time, much of the political argument remained within the narrow terms of the same discourse of security as the one promoted by the Bush administration itself rather than introducing a genuinely fresh set of political projects and concerns. The immigrant rights movement, on the other hand, changed the subject altogether. Of course, any causal claims of the movement's impact, of course, must remain at a purely speculative level. But it did undeniably manage temporarily disrupt a security discourse that was still showing expansive and self-reinforcing tendencies, revealing a political culture that remained resistant to the homogenizing effects of security as a passion.

Chapter III.

War, Crime and Emergency Powers: Modern Constitutionalism and its Boundaries

Constitutionalism and the Two Faces of Sovereignty

In this chapter, I will show how the models of emergency powers, such as dictatorship or the prerogative, that we have inherited from modern political thought presupposed a broader political structure that comprehended the major characteristics of the period roughly between the mid-seventeenth and the late nineteenth centuries: the formation of the modern state and the inter-state system, the differentiation and juridical formalization of the domains of crime and war, the development of constitutionalism and the period of European colonization and empire building. Unlike their ancient, feudal and renaissance predecessors and namesakes, modern theories of emergency powers were born alongside these developments, and play an important role in the larger theoretical structure and political imaginary following the formation of the modern state and modern constitutionalism.

My argument is that the function, scope and justification of modern theories of emergencies powers is constituted by the place they occupy within a broader conceptual architecture of the modern state, based on a categorical distinction between an *internal* space of peace and juridical order inside individual states, and an *external* space modeled on the state of nature existing between individual states. I will argue that the theories of emergency powers developed in this period presuppose this inside/outside division, and that their purpose, justification and scope derive from it. Emergency powers played a key role in maintaining the boundaries and divisions that characterized this conceptual architecture. They marked out a third,

intermediary category of temporary breakdowns in the internal domestic order that fell short of a full-scale dissolution of political authority, or a state of war between two collectivities. In other words, emergency powers designated the coercive powers of the state that were neither crime, nor war, neither an external condition between two states, nor an internal application of criminal justice against an individual miscreant. Rather, such temporary breakdowns of internal order had a separate status that avoided destabilizing the entire juridical edifice: neither war nor crime but *emergencies*. Pre-modern legal categories and institutions – chiefly, prerogative and dictatorship – were reformulated through this new architecture as *emergency powers*: exceptional institutions that were strong enough to overcome a temporary emergency, but regulated and limited to restoring the existing order rather than undermining it or creating a new one.

In the second place, in addition to this constitutionalist role of emergency powers, we can identify a second spatial category that emerged in conjunction with modern constitutionalism. This second category, which I will call *dominion*, corresponds on the one hand to the persistence of strains of pre-constitutionalist paternalistic rule over segments of the internal population, and on the other hand to the state's powers in non-European space of territorial appropriation and imperial rule. In this case, the spatial configuration that is maintained is not on the boundaries between the internal domestic versus the external interstate order. Rather, it is on the boundaries between recognized legal subjects with a juridical status designating agency and certain rights on the one hand, versus populations that are excluded from any recognized legal status, or occupy a legal status of non-agency, as dependents rather than rights-bearers. Like emergency powers, the forms of what I am calling dominion are exceptional institutions and juridical categories whose function is to maintain the fundamental spatial boundaries and divisions between inside and outside, crime and war, upon which constitutionalism depended. Although some of the

institutions and forms of emergency powers overlapped with those of dominion, they are conceptually distinct in that the purpose of the former is to separate exceptional governmental power from personified sovereignty, whereas the former refer to the absolute, discretionary powers of personified sovereignty directed against individual subjects and populations rather than other sovereign persons.

Hence, my argument will be that modern institutional models of emergency powers cannot be isolated from a three-part structure that distinguishes the paradigms of *crime*, *war*, *emergencies* and *dominion*. It was only within this structure, within the internal juridical space and in contrast to the paradigms of both crime and war, that a “liberal” or constitutional theory of emergency powers was possible. For this reason my focus in this chapter will not be exclusively on the institutions of prerogative and dictatorship but on the role these institutions play in the broader conceptual architecture of the constitutional state, and on their relationship to the paradigms of crime, war and dominion. It will be on how the justificatory logic and theoretical coherence of a constitutional or liberal theory of emergency powers depended upon its place within this larger conceptual architecture.

This has important consequences for the argument of this dissertation as a whole. Looking ahead briefly, when we turn to the twentieth century US in the second half of the dissertation, we shall see that this conceptual architecture underwent profound transformations. After 1945, the US no longer declared war in a constitutional sense, but instead engaged in a series of executive led international police actions. In the same time, the category of crime was judicially extended to include individual enemy combatants, in a process that excluded several essential attributes of the traditional crime paradigm. In the same process, emergency powers were expanded as a more general category to cover the new, grey area created by the shift and

overlap in the boundaries of war and crime. This more recent expansion of emergency powers beyond its former boundaries has been widely noted and lamented by recent scholars, but few have highlighted the simultaneous transformations in the paradigms of crime and war that have accompanied it, and have consequently left its normative and political consequences within the justificatory architecture of liberalism in a broader sense untheorized. This is of course the task of later chapters. Here, our task is to reconstruct the development and internal logic of that justificatory architecture of war, crime and emergency powers in its classic form.

This chapter is organized in four sections. In the first section, I present an ideal typical framework of the modern state, and subsequent theories of constitutionalism as they developed in the 17th and 18th centuries. I show how the axial inside/outside distinction provided the basis for the distinction between war and crime, and disaggregated the internal and external faces of sovereignty. This distinction between necessarily personified external sovereignty and depersonified internal sovereignty allowed opponents of absolutism to depict the internal powers of the state as disaggregated, delegated and subject to the rule of law. The second section shows how modern theories of emergency powers emerged from within this framework, and assumed served an important role within the overall conceptual and justificatory architecture of modern constitutionalism, by distinguishing even “emergency” raptures of internal rule of law from the external face of unified, unlimited sovereignty. Unlike an unlimited sovereign decision, emergency powers were exceptions to ordinary legality but nevertheless were delegated forms of power, and subject to legal authorization and limitation. In the third section, I develop this thesis in more detail by taking examining two institutional “archetypes” of modern emergency powers – dictatorship, and the prerogative. Focusing on the examples of Rousseau (dictatorship) and Locke (prerogative), I show how both authors incorporated these institutions into the structure of

their theories as a whole, in the process breaking with earlier, premodern understandings of dictatorship and prerogative and transforming them into distinctively modern, constitutional theories of emergency powers. Finally, in the fourth section, I return to the international spatial order of the modern state from the perspective of European colonial expansion and empire. While constitutionalism and emergency powers solved the problem of the internal “state of exception,” and the system of equal sovereign personhood stabilized it in the external interstate order, the delimitation of a space of unlimited land appropriation and dominion outside of Europe preserved a “state of exception,” distinct from emergency powers, within the structure of external sovereignty.

I. theoretical architecture: crime, war and the inside/outside distinction

Constitutional emergency powers, like modern constitutionalism, both presuppose and emerge in response to modern state-building and the absolutist theory of state sovereignty. In very broad outline, the creation of the modern absolutist state was a vehicle of secularization and territorial unification, paving the way for the new juridical doctrines of absolute, unified sovereignty. First, this process broke the overlapping imperial and papal claims to political authority, secularizing political power and distributing it among a multiplicity of individual state actors, each supreme within an exclusive territory. Secondly, it created a single unified jurisdiction within each territory by expropriating the means of administration from the independent nobility and by subjecting all particular orders, privileges and estates to a superior, centralized legislative authority.²⁸⁷ Third, it neutralized creedal conflict and overlapping secular and sacred authorities

²⁸⁷ The classic account is Max Weber, “Politics as a Vocation,” in Weber, M. (1994). Weber : political writings. Cambridge ; New York, Cambridge University Press. For various dimensions of this process, see Heinz H. F. Eulau, “The Depersonalization of the Concept of Sovereignty,” *Journal of Politics* 4, no. 1 (1942); Poggi, G. (1978). The development of the modern state : a sociological introduction. Stanford, Calif., Stanford University Press.

by giving to each sovereign power the authority to determine its own religion doctrine within its borders, demarking a sphere of public authority and pushing belief into the inner domain of the individual conscience.²⁸⁸ Fourth, by separating the individual criminal from the collective enemy, disassociating punishment from vengeance and by giving the state an exclusive monopoly upon the determination and punishment of criminal guilt, it cauterized creedal and familial blood feuds and created a secular, de-politicized paradigm of criminal justice in which guilt is strictly individualized, privatized, and disassociated from membership or the inner domain of belief. Finally, conflict between collectivities was expunged from the internal territorial order of the commonwealth and relocated in the space between unified political communities, represented externally as formally equal sovereign persons. This international “state of nature” replaced any papal or imperial basis for *justa causa*, and made the decision to go to war a matter of each individual public person’s right to interpret and executive natural law.²⁸⁹

The categorical distinction that serves as a foundation for this edifice is the opposition – familiar to us from early social contract theory – between an *internal* condition of a law-governed and unified juridical order, and an *external* condition of formally equal individual

²⁸⁸ This account is of course a retrospective one. The concept of toleration, in particular, was not articulated in its clearest form until the end of the 17th century, most famously in Baruch de Spinoza's *Tractatus Theologico-Politicus* (1670), Pierre Bayle's *Commentaire Philosophique* (1686) and John Locke's “Letter Concerning Toleration” (1689). However, the concept of the sanctity of the individual conscience in distinction to the ‘public’ sphere regulated by law, is present much earlier and is the innovation of absolutism rather than liberalism. For instance, in Luther's “Freedom of a Christian Man.” It's also an important upshot of Thomas Hobbes' argument for subjecting all ecclesiastical authority to the sovereign, that no citizen could be obligated to anything that was not a means (according to the judgment of the sovereign) for self-preservation. Hobbes clearly regarded this doctrine as a major limitation to the powers of church authorities over individual conscience, and implied a doctrine of toleration. See *Leviathan* ch. 42 and ch. 47. For a discussion, see Tuck, R. (1993). *Philosophy and government, 1572-1651*. Cambridge [England] ; New York, NY, USA, Cambridge University Press., 329-335; Koselleck, *Critique and Crisis*, 48-50.

²⁸⁹ Schmitt, C. and G. L. Ulmen (2003). *The nomos of the earth in the international law of the Jus Publicum Europaeum*. New York, Telos Press.; Tuck, *The Rights of War and Peace*; Koskenniemi, M. and ebrary Inc. (2002). *The gentle civilizer of nations the rise and fall of international law, 1870-1960*. Cambridge, UK ; New York, Cambridge University Press.

persons, each interpreting and executing natural law as they see fit, without any commonly acknowledged superior. While variations of this contrast were expressed theoretically in the hypothetical “contractual” origins of the state, the image of the state of nature, and its contrast to internal order of political society, actually corresponded to a reality that was not just hypothetical or conjectural but embodied in experience and practice: the external relations between individual states.²⁹⁰ As Reinhart Koselleck summarizes,

The termination of religious civil wars meant the development of vigorous sovereign authorities which would in turn proceed to solve the ecclesiastical problems, in its own way. It also led to the strict formation of States on a unified plane. By virtue of absolute sovereignty, each State’s interior was clearly delimited against the interiors of its neighbours. The conscience of a sovereign was absolutely free, but his jurisdiction was confined to the inner space of the State he represented. The State itself thus became a *persona moralis* confronting other States likewise conceived as *personae morales*...without submitting like men *qua* citizens to any common, institutionalized higher authority.²⁹¹

The spatial and functional separation of external and internal orders into a categorical contrast was accomplished by modern natural rights theory in the following century. Drawing on and amplifying the innovations of Grotius, Thomas Hobbes rearticulated the Machiavellian skepticism about the ability of moral precepts to determine the arts of statecraft, and projected this view about independent *states* unto the behavior of independent *individuals* in a hypothetical state of nature.²⁹² As Norberto Bobbio has argued,

²⁹⁰ Tuck, *Rights of War and Peace*, “Introduction”

²⁹¹ Koselleck, *Critique and Crisis*, 43

²⁹² Tuck, *Rights of War and Peace*, ch. 1.

Hobbes's political system is based on a great dichotomy, which is extremely simple and clear. There is a *state of nature*, in which human beings live without positive laws to force them to reciprocal respect. And there is *civil society*, in which there exists a common power which forces them, against their will, to comply with the laws necessary to ensure peaceful cohabitation. The former is a state of constant and universal war. The latter is a state of permanent peace.²⁹³

Inside the commonwealth, a system of general, coercive laws is imposed on all subjects, creating a uniform juridical space for legal subjects wherein they are free to follow their arbitrary wills and preferences within the domain of non-prohibited conduct established by the laws. Outside the commonwealth, the condition Hobbes famously described as “the natural condition of mankind” in the *Leviathan* persists. While Hobbes' state of nature is sometimes read as a hypothetical, theoretical construction, Hobbes in fact makes clear that it reflects an empirically existing condition *between* states. In the famous chapter 13 of the *Leviathan*, after sketching a stylized “natural condition” of *individuals* Hobbes emphasizes that even if this “natural condition” cannot be established historically, it nevertheless depicts the real, ongoing condition of the state of nature as it exists between states:

in all times, Kings, and Perons of Sovereigne authority, because of their Independency, are in continuall jealousies, and in the state and posture of Gladiators; having their weapons pointing, and their eyes fixed on one another; that is, their Forts, Garrisons, and Guns upon the Frontiers of their Kingdomes; and continuall Spyes upon their neighbours, which is a posture of War.²⁹⁴

²⁹³ Bobbio, N. (1993). *Thomas Hobbes and the natural law tradition*. Chicago, University of Chicago Press., 197.

²⁹⁴ Ch. 13, 90. And later: “Concerning the Offices of one Sovereign to another, which are comprehended in that Law, which is commonly called the *Law of Nations*, I need not say any thing in this place; because the Law of Nations, and the Law of Nature, is the same thing. And every Sovereign hath the same Right, in procuring the safety of his People, that any particular man can have, in procuring his own safety. And the same Law, that dictateth to men that have no Civil Government, what they ought to do, and what to avoyd in regard of one another, dictateth the same to Common-wealths, that is, to the Consciences of Sovereign Princes, and Sovereign Assemblies; there being no Court of Naturall Justice, but in the Conscience onely...” Chap. 30, pg. 244.

The overriding right to self-preservation enjoyed by the individual into the state of nature carries over to each individual state vis-à-vis every other individual state in the international state of nature. This fundamental distinction between inner and outer cuts through a broad swath of modern theories of the state, creating a common conceptual field within which absolutist and constitutionalist, monarchical and republican authors developed their own variations and arguments upon these common theoretical coordinates.

Summarizing this general framework following the peace of Westphalia, Carl Schmitt referred to it as a historically specific spatial order of international law, or the *jus publicum Europaeum*. For Schmitt the spatial order of international law that emerged in the 16th and 17th centuries broke sharply with the theological and moral universalism of the *respublica Christiana*, which asserted the Church's authority in the law of peoples and determined the principles of just wars of aggression as well as defense. The new international order, reflecting the state of nature theories I've outlined here, abandoned the morally binding determinations of warfare and suspended the principle of *justa causa*. In its place it asserted the principle of equal sovereignty of European states enjoying immunity from moral or theological condemnation.

Schmitt has depicted the de-moralization of warfare we observed in the Hobbesian tradition as a great achievement of European civilization. "Given this juridical formalization, a rationalization and humanization – a bracketing – of war was achieved for 200 years."²⁹⁵ In this period, a public enemy was the status of a recognized opponent in war, in which two sovereign states pursue their right by force in accordance with the mutually observed norms of civilized warfare. In the *jus publicum Europaeum*, the public enemy was not a criminal to be punished or

²⁹⁵ Schmitt, *Nomos of the Earth*, 121.

a evildoer to be annihilated, but a legitimate opponent possessing formally equal rights to go to war, make treaties and pursue land-claims outside the European spatial order.²⁹⁶ This achievement was inseparable from the formal equality of sovereign personhood. “The principle of the juridical equality of states made it impossible to discriminate between a state that pursues a just war and one that pursues an unjust war. This would make one sovereign a judge over another,”²⁹⁷ and thus, as Hobbes, Locke, Blackstone, Rousseau and Kant all recognize, follows logically from the condition of the state of nature, in which no superior judge exists to arbitrate disputes among equals.²⁹⁸

Retributive Justice vs. Right of Self-Preservation

This fundamental ordering distinction between inside and outside made possible the formalization of two different sets of criteria and paradigms for the state’s use of coercive power, which I will call retributive justice and the right to self-preservation. The former applies to the state’s internal coercive powers, and the latter to external powers. The centrality of the right to self-preservation in the external space among states derives not only from the absence of any commonly recognized superior, but also from the manifest impossibility of ensuring uniform interpretation of moral or theological precepts among different actors. Moreover, even without this problem, the unreliability of sanction-less moral norms to consistently restrain action was widely recognized.²⁹⁹ This recognition of the weakness or indeterminacy of moral norms in international space, along with the overcoming of creedal conflict, led to a thinning of *justa*

²⁹⁶ Ibid., part III, chap. 1.

²⁹⁷ Ibid., 167.

²⁹⁸ Ibid. 147

²⁹⁹ Locke, and to some extent Pufendorf and Montesquieu, are somewhat exceptional here, allowing a stronger degree of consistency in moral norms in the state of nature than the more radically minimalist theorists like Grotius, Hobbes or Rousseau.

causa into a kind of minimalist point of common convergence: the reciprocal recognition of the equal right of each to exist as a sovereign state, and the corollary right to the means it judges necessary to preserve its sovereign independence and territorial exclusivity, including the *jus belli* or right to declare war.³⁰⁰ This bracketing of justice or morality in war flowed from the recognition of formal sovereign equality and, as Vattel observes, the “parfaite égalité de droits entre les nations, sans regard à la justice intrinsèque de leur conduite, dont il appartient pas aux autres de juger définitivement.”³⁰¹

Underlying this external minimalism is the view that justice requires a commonly recognized superior authority to legislate, judge and enforce commonly binding norms. In other words, justice is applicable only to the *internal* condition of domestic political order. As Hobbes puts it, outside the boundaries of the domestic order, there can be no justice, crimes or criminals since

the Civill Law ceasing, Crimes cease: for there being no other Law remaining, but that of Nature, there is no place of Accusation; every man being his own Judge, and accused onely by his own Conscience, and cleared by the Uprightnesse of his own Intention.³⁰²

Thus, while any substantial norms of justice or criminality were suspended in the external space between states, the unification of the juridical order *inside* the state made possible the development of a condition of political Right and the paradigm of criminal justice that would become central features of constitutional theory as well as its absolutist predecessors.

³⁰⁰ Schmitt, *Nomos*, 147.

³⁰¹ quoted in *Ibid.*, 167.

³⁰² Hobbes, *Leviathan*, 214

The Crime Paradigm

Hobbes stressed the relationship between the strictly *individual* and *depoliticized* character of crime, and its exclusive location *inside* the juridical space of the commonwealth. In contrast to sin, Hobbes stipulates that crime must refer to a distinct *act* “whereof one man may accuse another” rather than “meer Intentions.”³⁰³ Moreover, while one may sin against natural law, crime requires the violation of a positive law enacted by the sovereign, so “that the Civill Law ceasing, Crimes cease: for there being no other Law remaining, but that of Nature, there is no place of Accusation; every man being his own Judge, and accused onely by his own Conscience, and cleared by the Uprightnesse of his own Intention.” Similarly, *punishment* refers only to the “evil inflicted by publique Authority” on the individual judged by the sovereign to have committed a crime.³⁰⁴ Punishment is categorically distinguished from forms of private “hostility,” such as revenge: “the aym of Punishment is not a revenge, but terrour” inflicted in order to make subjects “better disposed to obedience.”³⁰⁵

Whereas only loyal subject are capable of crime, and hence of being punished, those who do not recognize the authority of the laws are “enemies,” who are legitimately the objects of hostilities rather than punishment.

Harme inflicted upon one that is a declared enemy, fals not under the name of Punishment: Because seeing they were either never subject to the Law, and therefore cannot transgresse it; or having been subject to it, and professing to be no longer so, by consequence deny they can transgresse it, all the Harmes that can be done them, must be taken as acts of Hostility.” Such enemies most obviously include other states, but can also

³⁰³ *ibid.*, 202.

³⁰⁴ *Ibid.*, 214

³⁰⁵ *ibid.*, 214-5

include foreign individuals and rebellious subjects that “in denying subjection... denyes such Punishment as by the Law hath been ordained; and therefore suffers as an enemy of the Commonwealth.”³⁰⁶

With such enemies, we leave the juridically constituted space of the commonwealth altogether and enter the state of nature and war, wherein the law of nature is replaced by the law of nations.³⁰⁷ As Hobbes makes clear in the famous Chapter XII of the *Leviathan*, the state of nature persists “in all times” in the relations among various sovereign persons, even though it is left behind within each individual state.³⁰⁸

While subsequent constitutional theorists revised Hobbes’ absolutist underpinnings, they did not substantially alter the juridical framework upon which Hobbes built his theory, and the categorical distinctions between internal and external, crime and war. Locke, employing the contractarian framework against absolutism, nevertheless maintains the strict distinction between the state of nature and civil society. In place of Hobbes’ theory of impersonated action, Locke identifies the commonwealth with the creation of a sovereign community that entrusts the individual right to execute natural law to a common, neutral, legally constituted judge.³⁰⁹ The neutral and impartial stipulation of crime and determination of punishment are possible only within political society:

³⁰⁶ *ibid.*, 216

³⁰⁷ Hobbes makes this equivalence explicit in *De Cive*: “the precepts [of the law of nature and the right of nations] is the same: but because commonwealths once instituted take on the personal qualities of men, what we call a *natural law* in speaking of the duties of individual men is called the *right of Nations*, when applied to whole commonwealths, peoples or nations.” Quoted in Tuck, 129.

³⁰⁸ “in all times, Kings, and Perons of Sovereigne authority, because of their Independency, are in continuall jealousies, and in the state and posture of Gladiators; having their weapons pointing, and their eyes fixed on one another; that is, their Forts, Garrisons, and Guns upon the Frontiers of their Kingdomes; and continuall Spyes upon their neighbours, which is a posture of War. But because they uphold thereby, the Industry of their Subjects; there does not follow from it, that misery, which accompanies the Liberty of particular men.” *Ibid.*, 90.

³⁰⁹ “And this puts men out of a state of nature into that of a common-wealth, by setting up a judge on earth, with authority to determine all the controversies, and redress the injuries that may happen to any member of the commonwealth; which judge is the legislative, or magistrates appointed by it. And where-ever there are any number of men, however associated, that have no such decisive power to appeal to, there they are still in the state of nature.” John Locke, *Second Treatise* (para. 89).

And thus all private judgement of every particular Member being excluded, the Community comes to be Umpire, by settled standing Rules, indifferent, and the same to all Parties; and by men having Authority from the Community, for the execution of those Rules, decides all the differences that may happen between any Members of that society, concerning any matter of right; and punishes those Offences, which any Member hath committed against the Society, with such penalties as the Law has established: whereby it is easy to discern, who are, and who are not, in political society together (para. 87).

Even more than Hobbes, Locke places great emphasis on the persistence of the state of nature in all circumstances in which no commonly accepted, neutral judge is available. Indeed, this forms the basis of one of Locke's main attacks on absolutism, which in his terms is not a civil condition at all but by definition in the state of nature. At the same time, Locke gives even more emphasis than Hobbes to the persistence of the state of nature in the relations between and among states. Lacking a neutral judge, the law of nations is nothing more than non-positive natural law, which each commonwealth like each independent person is free to interpret and executive individually, necessarily judging in their own case.³¹⁰

Without discounting important differences among various authors and traditions, we can point to a threefold distinction within this general framework between *crime*, *enmity*, and *emergency*. Crime, as we have seen, is an individual violation of positive law. Both the process of ascertaining individual guilt and punishment by public coercive power, are thoroughly constituted by public law. Will-based theories of punishment tend to stress the dimension of re-instantiating the condition of right, and forcing the citizen to be free.³¹¹ Common-law theories equally emphasized the publicly and legally constituted nature of crime by emphasizing the

³¹⁰ Locke also argues that each individual (and hence, state) is also free to punish what it sees as transgressions of the law of nature, *even if they themselves are not affected*....

³¹¹ Rousseau, Kant, Hegel.

procedural preconditions for the valid determination of guilt in the form of legal rights of a defendant.³¹² In this tradition, the rights of habeas corpus and trial by jury and other procedural rules were definitive and constitutive of the theoretical meaning of crime. Without these features, the category of crime was inapplicable.

Constitutionalism and the Separation of Internal from External Sovereignty

By the mid- to late 17th century, opponents of absolutism achieved a new theoretical synthesis, rearticulating theories of the separation of powers and rule of law through the conceptual foundations of the modern state laid by their absolutist antagonists such as Thomas Hobbes. The axial distinction we saw in Hobbes between inside and outside was reproduced in almost identical terms by modern constitutional theorists. John Locke, for example – in many respects diametrically opposed to Hobbes – asserts that “all *Princes* and Rulers of *Independent* Governments all through the World, are in a State of Nature” with respect to one another.³¹³ Locke, as much as Hobbes, rested his theory on a fundamental spatial contrast between inside and outside, between

those who are united into one body, and have a common established law and judicature to appeal to, with authority to decide controversies between them, and punish offenders, *are in civil society* one with another: but those who have no such common appeal... are still in the state of nature, each being, where there is no other, judge for himself, and executioner.³¹⁴

³¹² This applied *before* 19th century utilitarianism, of course.

³¹³ *Second Treatise*, § 14, 276. Again, much later in the text, Locke repeatedly makes the analogy between the theoretical construction of individuals in the state of nature, and the really existing fact of states in a state of nature even more explicit: “For example, I in the state of Nature (and all Commonwealths are in the state of Nature with another)...,” §183, 390. And in the following paragraph: “...Men in the state of Nature (as all Princes and Governments are in reference to one another)...,” § 184, 392.

³¹⁴ *Ibid.*, §87

Moreover, an avowedly non-absolutist, constitutional author such as Blackstone, writing a century and a half later, argued in almost identical terms that offenses against the law of nations fall outside the paradigm of criminal justice, since

offences against this law [of nations] are principally incident to whole states or nations, in which case recourse can only be had to war; which is an appeal to the God of hosts, to punish such infractions of public faith as are committed by one independent people against another: neither state having any superior jurisdiction to resort to upon earth for justice.³¹⁵

Kant, of course, had very different hopes for a future international order, but it is noteworthy that Kant's entire argument for a world federation of states derived from a nearly identical assessment of the inapplicability of norms of justice in the external condition between sovereign states. Indeed, for Kant the reason why it is an unconditional moral duty for individuals in a lawless condition to submit to *any* sovereign authority whatsoever is the same as the reason for working toward a future world federation:

It is not experience from which we learn of the maxim of violence in human beings and of their malevolent tendency to attack one another before external legislation endowed with power appears, thus it is not some deed that makes coercion through public law necessary. On the contrary, however well disposed and law-abiding human being might be, it still lies a priori in the rational idea of such a condition (one that is not rightful) that before a public lawful condition is established individual human beings, peoples and states can never be secure against violence from one another, since each has its own right to do *what seems right and good to it* and not to be dependent upon another's opinion about this.³¹⁶

³¹⁵ Blackstone, *Commentaries* 314 (ed. Cooley, 1884).

³¹⁶ Kant, "Metaphysics of Morals," Section II, §44, in *Practical Philosophy*, 455-6. Also quoted in Tuck, *Rights of War and Peace*, 207-8.

Despite sharing these structural foundations, three fundamental ways in which constitutionalism broke with absolutism are worth emphasizing here. First, constitutionalist writers rejected Hobbes' contention that the unity of the state must be *represented* by a single, unified sovereign person such as the monarch or assembly. This amounted to the claim that the totality of sovereign power must inhere in a single agent or "organ," under which everything else is subordinate, and formed a key plank of the absolutist attack on older conceptions of mixed government that claimed to both limit the powers of the monarch, and in some cases furnished theories of legitimate resistance and even tyrannicide. Constitutionalist authors such as John Locke deflected this not by abandoning unified sovereignty for the older mixed government theory, but by severing the link between unified sovereign as the source of all political authority, on the one hand, and the institutions and offices of government. *All* institutions of domestic rule, including the primary legislative and executive powers, are conceived as exercising various forms of limited, *delegated* power rather than possessing sovereignty as such. Rather than inhering in a representative, sovereignty is held by the community as a whole, expressed as the unity of the people or "body politic" within a territory.³¹⁷ Thus, shifting sovereignty from the personal locus of a representative to the unity of the political community as a whole made it possible to conceive of a unified, hierarchical, supreme juridical order, while at the same time asserting that all positive political institutions within the state are both limited in scope and are not absolute even within their proper sphere of activity. In other words, it made the separation of powers once more consistent with modern sovereignty.

Secondly, unlike earlier conceptions of the mixed constitution, the conditions of territorial exclusivity and the separation of the state from society elevated the "rule of law" from

³¹⁷ Locke, *Second Treatise*, § 88, 324-5.

a particularistic network of rights and privileges to a single, wholistic framework that applied *comprehensively* to all forms of power within the territory and *uniformly* to every legal subject within the commonwealth. Finally, unlike earlier legal restrictions, modern constitutionalism does not modify or limit existing power holders but *constitutes the conditions for legitimate political power* as such. These express the idea that *law, and only law* creates the condition for legitimate political rule. Rulers do not preexist the rules that apply to them. The constitution itself *establishes* legitimate political power. Ordinary law arises from the government and uniformly binds every individual in society. And constitutional law arises from the people collectively, and uniformly binds every member of government.

Thirdly, these two major premises of modern constitutionalism – the separation of powers and the rule of law – do not involve a rejection of modern state sovereignty but on the contrary, presuppose the modern state and unified sovereignty. Legal supremacy requires not only the unity of the juridical order but also territorial exclusivity (legal comprehensiveness), the privatization of society (legal uniformity), the monopoly of legitimate coercion (the object of constitutional law) and the people as a political unit (the source of constitutional authority).³¹⁸ Constitutionalism, then, presupposes state sovereignty, but rejects the contention of absolutism that sovereignty must be represented or personified in a single agent or institution of domestic political rule. Another way of expressing the same point is that constitutionalism presupposes unified *external* sovereignty from the perspective of the international order, but it rejects unified *internal* sovereignty from the perspective of domestic political rule.³¹⁹ How can external sovereign equality be maintained within internal supremacy? Drawing from Carré de Malberg, Arato and Cohen helpfully clarify the issue by distinguishing between “organ”

³¹⁸ Grimm, D. (2010). "Does Europe Need a Constitution?" *European Law Journal* 1(3).

³¹⁹ Jean Cohen, “Sovereignty: Contemporary Transformations,” *Raison publique*, 5 (2006), 37.

sovereignty, in which a single agent or institution possesses all sovereign competences, and “state” sovereignty, in which sovereignty is united externally, while internally sovereign powers are disaggregated through the separation of powers and limited by constitutional law.³²⁰

The two faces of “state” sovereignty – externally unified and personified and internally disaggregated and pluralized – neatly captures the presuppositions of modern constitutionalist authors such as Locke, Montesquieu and Kant as well as the American Federalists. It provides an elegant theoretical solution to an otherwise insurmountable problem for the claim that constitutional law establishes the conditions for legitimate political power, or in other words that the rule of law amounts to the abolition of [unified] sovereignty within the body politic...³²¹

Yet, as Arato and Cohen suggest, and as these constitutionalist writers were probably aware, this neat distinction between internal and external is more easily accomplished in theory than in political practice. While internal sovereignty may be disembodied, it is more difficult to avoid the, albeit temporary, embodiment or “personification” of external sovereignty in whatever agent is empowered with the task of representing the state outwardly to other states, in its unified capacity as a sovereign person. It is the legal supremacy of the domestic constitution that makes the separation of powers and institutional checks and balances coherent, allowing a differentiation into circumscribed legislative, executive and judicial functions. But this supremacy of course ends at the state’s territorial boundaries, and it would seem to follow necessarily that some “organ” must assume the task of representing the unified competences of external sovereignty without being subject to the internal limitations entailed by domestic constitutionalism. This theoretical question raised a host of institutional difficulties and

³²⁰ Andrew Arato and Jean Cohen, “Banishing the Sovereign? Internal and External Sovereignty in Arendt,” *Constellations* 16, no. 2 (2009): 309.

³²¹ The phrase is Hannah Arendt’s, but my discussion here draws from Arato and Cohen’s analysis of it in “Banishing the Sovereign?”

challenges. An even larger problem, however, is the issue of how the competences of external sovereignty can be maintained externally but sealed off entirely from the internal realm, and prevented from showing up inside the commonwealth.³²² I want to suggest that constitutional theories of emergency powers were developed as important means to resolve precisely this problem of ensuring that the boundary between internal and external sovereignty is maintained, even in exceptional, emergency situations that would otherwise lead to the breakdown of this boundary.

II. Taming the Exception: Constitutional Theories of Emergency Powers

Keeping in mind our 17th and 18th century context, among the fundamental “marks” of external sovereignty are the right to self-preservation, and the exclusive rights to judge the means necessarily to enjoy this right, hence the self-interpretation of treaties and other conventions of the law of nations, and the inalienability of the *jus belli*. The problem this poses to the separation model is that many if not all of the means to self-preservation have internal, domestic consequences. Most obviously, even declaring a conventional, “limited” war can impose great hardship on the domestic population. From a constitutional perspective, the means to self-preservation may include the state’s ability to extract sufficient resources for war, or its powers to maintain standing armies or impose obligatory military service on its citizens. All of these means, however, can very well – and historically did – run afoul with internal constitutional limitations on the power and scope of the executive branch.³²³ Beyond the scope of ordinary

³²² Arato and Cohen, “Banishing the Sovereign.”

³²³ A classic example, at the heart of English constitutional struggles in the mid 17th century, was the famous Ship Money Case, in which Charles I imposed a maritime tax without parliamentary consent on the inland counties of England. The Crown claimed the prerogative power to impose extraordinary taxation when the king determined a situation of extreme danger and immanent threat to the realm. The Crown’s Writ of May 22, 1637 cited the immanent threats presented by “certain thieves, pirates, and sea-robbers, as well as Turks, enemies of Christianity,

limited war, the possibilities of invasion, domestic insurrection or a breakdown of internal order and political authority pose more severe challenges to the inside/outside dichotomy. A successionist movement, for instance, or a domestic insurrection clearly pose fundamental challenges to the state's right to self-preservation, but all of the relevant means to defend this sovereign right would fall *within* the state's territorial boundaries, in the realm where sovereignty has been disaggregated and pluralized. All of these cases would seem to break the duality accomplished by "state" sovereignty in two irreconcilable pieces, requiring either the renunciation of statehood and external sovereign equality altogether, or allowing the "external" face of organ sovereignty to rear its ugly head domestically. In either case, the precondition of constitutionalism collapses along with the internal/external distinction.

In light of this severe problem, how can the separation of the two faces of sovereignty be maintained? My claim at this juncture is that many early modern constitutional writers were aware of the gravity of this problem, and that many turned to institutions of emergency powers as a key solution to it. We are now in a position to elaborate my earlier statement that constitutional theories of emergency powers served as an intermediary category between crime and war, between *unified* external sovereignty and internally separated sovereign powers, working to maintain the distinction between the two and prevent the collapse of the structural edifice of constitutionalism that this distinction maintained. Stated broadly, my argument is that

and others confederated together." Quoted in Armitage, D. (2000). *The ideological origins of the British Empire*. Cambridge ; New York, Cambridge University Press., 116. The case seems to have made a deep impression on Thomas Hobbes, who would subsequently refer to the dispute in later writings as an example of the disastrous political consequences produced by the ideologies of constitutionalism and mixed government. See Tuck, *Politics and Government*, CITE. Opponents of the Crown denounced the policy as an invasion on the property rights of Englishmen, on the false and illegitimate pretenses of sovereign necessity against external enemies. As claimed, for example, by Edmund Waller in his speech against Sir Edward Crawly. See also Henry Parker, *The Case of Ship Money Briefly Discoursed*. Such critics rejected the Royalist postulation of a "necessary connection between the empire of the seas and the liberty of Englishmen, especially when that liberty was defined as security of property, the nation's naval defense provided the expedient for extraordinary fiscal exactions, and the maritime definition of the realm depended on the extent of prerogative power." Armitage, 118.

models of emergency powers provide a framework in which *internal, domestic manifestations of unified external sovereignty can appear as extraordinary, exceptional but nevertheless law-governed forms of emergency powers*. The bedrock criteria for emergency powers are when the means to the state's right to self-preservation intrude upon the internal, law-governed domestic space of constitutionalism and disaggregated sovereignty. The powers involved at this general level could range from temporary grants of taxation or spending powers of the executive to raise armies, to the violation of individual property rights to secure public order, to the wholesale suspension of core constitutional protections such as *habeas corpus*. The scope of circumstances to which they could apply is extremely broad, ranging from the domestic imperatives to ordinary warfare, natural disasters, riots, rebellions, etc. Despite this broad scope, the category of *emergencies* is coherent by virtue of the constitutional position it occupies, not its specific nature or causes. Emergencies in this sense are temporary disruptions in the internal order of a commonwealth that fell short of the general dissolution of state sovereignty, but nevertheless require some internal manifestation of external unified sovereignty. In other words, they corresponded to the discretionary rights sovereignty *inside* the body politic, not in *wars* but in *emergencies*. Institutions and legal categories such as dictatorship, prerogative and martial law were all taken up and transformed in the 17th and 18th centuries as ways of conceptualizing the temporary discretionary power necessary to deal with urgent threats and temporary disruptions of effective internal sovereignty that are consistent with the rule of law. It is in this sense that I suggested that we can think of emergency powers as a twin of modern constitutionalism.

This claim will certainly seem controversial. After all, medieval legal discussions of *utilitas publica*, *status regni* all concern the circumstances under which violating positive law for

the sake of the common good would accord with reason and justice.³²⁴ And of course, the Roman Republic itself is the source of what is often regarded as the most important template of all institutions of emergency powers: the dictatorship.³²⁵ The phrase “government of law” derives from Livy, not the moderns, and legality was no less important in medieval cannon law.³²⁶ The distinctiveness of modern emergency powers lies in the dual significance of the conception of contingency and *raison d'état* and the theory of unified sovereignty, both discussed at length in the previous chapter. On the one hand, we saw that the artificiality of political order, and the importance of contingency, unpredictability and primacy of self-preservation outside the juridico-political order created a permanent tension between “force” and “right” within the modern state. In terms of a state of exception, this tension is expressed by the space between the structure of normative validity, and the factual conditions under which that normative structure can become actual.³²⁷ This space is the proper locus of emergency powers, which therefore reflect an instrumental, means/ends justificatory logic by nature. On the other hand, we also saw the development, in its monarchical and popular forms, of a theory of unified sovereignty as the supreme source of law. The modern conception of the sovereign law-giver transformed the classical understanding of political institutions: in the modern conception, all institutions apart

³²⁴ See Gaines Post's excellent discussion in *Studies in Medieval Legal Thought*, chap. 5; see also Ernst Kantorowicz, “*Pro patria mori* in Medieval Political Thought.”

³²⁵ Schmitt; Rossiter, etc. Many critics of modern emergency powers seem to agree: see Kalyvas, A. (2007). “The Tyranny of Dictatorship.” *Political Theory* 35(4). Some scholars have referred to ancient Greek institutions as either precursors of or, for Kalyvas, alternatives to, the dictatorship. But there seems to be little questions that the dictatorship was the most institutionally elaborated of such institutions in the ancient worlds. For the opposite claim, however, see Agamben, *State of Exception*.

³²⁶ Livy, 2.1.1.

³²⁷ Thus, Wilfred Nippel has argued that the Roman had no conception of mixed government in the modern sense as a set of “normative ideas of a necessary differentiation of governmental functions.” For Polybius, for example, the distinguishing characteristic of the mixed constitution it gave the *natural* order of different social classes a *political* expression, transforming the instability of the simple composites of government by the one, the few or the many into a stable, self-correcting complex composite of the mixed constitution. Nippel, “Ancient and modern republicanism,” in Franklin, J. H. (1978). *John Locke and the theory of sovereignty : mixed monarchy and the right of resistance in the political thought of the English Revolution*. Cambridge ; New York, Cambridge University Press.

from sovereignty itself were created through delegation and commission by the sovereign; all such institutions possessed the right to exercise power within the bounds of their commission by virtue of an authorization by the sovereign. This was true not only of Hobbes' absolutist or Rousseau's radical republican theories but equally true of constitutional theories of the separation of powers. These were based either on a theory of constituent popular sovereignty, which all constituted powers are delegations of the people, or an internal depersonalization and constitutionalization of sovereignty, in which sovereignty becomes identified with the totality of the legal order.³²⁸

Thus, whereas absolutist theories had no special need for emergency powers since the sovereign legislature was also a positive agent represented by the monarch, constitutionalist theories, having banished unified sovereignty from any institutional embodiment, *required* an extraordinary commission, distinct from sovereignty itself, to occupy the gap between legal norms and their means of realization.³²⁹ Both absolutist and constitutional theories, however, shape a common definition of both the exception and of emergency powers that is not present in the ancient or medieval theories. Absolutist theorists such as Bodin, Hobbes and Spinoza all affirm that laws should be general and stable, oriented toward the wellbeing of the subjects and not arbitrary or capricious. The sovereign, however, is the sole and exclusive judge of *when* the state's right to self-preservation requires an *exception* to these norms, and what the measures required in the exception will be.³³⁰ Constitutional theories of emergency powers, on the other

³²⁸ i.e., in terms of the theories discussed here, the Lockean or the Blackstonian and Montesquieuan solutions, respectively.

³²⁹ Likewise, a measure of Hobbes' originality and radical break from more traditional theories of absolutism is the remarkable fact that he was so unconcerned with the prerogative that he does not appear to have even bothered to mention it in any of his major works. As far as I can tell, he is unique in this among anyone writing about the English civil war in this period.

³³⁰ Bodin, J. and J. H. Franklin (1992). *On sovereignty : four chapters from the six books of the commonwealth*. Cambridge England ; New York, Cambridge University Press. Cambridge: Cambridge University Press. 1992. Bodin argues that, in spite of the extraordinary power wielded by these officeholders, "we may conclude that neither

hand, separated both the decision on the exception and the measures taken therein from sovereignty itself, and proposed different institutional solutions for delegated commissioned agents to exercise extraordinary but temporary and restrained power in the exception.

In spite of this important difference, however, there is an equally important similarity that differentiates the modern theories from their predecessors. Following from the theory of unified sovereignty, both absolutist and constitutional theorists define emergency powers in the same way: as a delegated and commissioned institution whose power, and the limits imposed upon it, derive from a sovereign authorization. Hence, Bodin, Hobbes and Spinoza each define dictatorship by distinguishing it conceptually from sovereignty, which is precisely the central distinction made by constitutional theories of emergency powers in Locke, Montesquieu, Rousseau, etc.

For absolutist theories, the norm of non-discretionary rule through legal and institutional continuity was self-imposed and self-enforced, so that the sovereign was accountable to no one but God. Within this framework, the importance and significance of the exception, and the degree to which emergency magistrates like the dictator were attractive, varied in accordance to the emphasis on the sovereign's self-binding. Hobbes, characteristically occupying an extreme position, comes close to dissolving even the coherence of the terms with which norm and exception could be theoretically distinguished, and therefore unlike Bodin and Spinoza has little to say about the value of emergency magistrates.³³¹ In contrast, for constitutionalism the legal and non-arbitrary character of rulers was the very condition of legitimate political power inside

the Roman dictator. . . nor the regents in kingdoms, nor any other commissioner or magistrate who had absolute power for a limited time to dispose of the affairs of the commonwealth, had sovereignty." pg. 2. On Hobbes and the Ship Money case, see Tuck, *Philosophy and Government*, 313.

³³¹ Of course this is not to say that Hobbes advocated arbitrary, discretionary rule over legal and institutional continuity. But his concern with dissolving any basis on which the sovereign could be criticized was so intense that he was willing to bite the bullet and acknowledge that his theory left nothing to say about the matter.

the commonwealth. Thus, the distinction between the exception – the space between legal norms and the condition of their realization opened by the priority of self-preservation – was categorical and qualitative rather than contextual and quantitative. Moreover, for the same reason, emergency powers were not optional but necessary. Discretionary power during emergencies required a special, exceptional commission, and a constitutional if not always statutorily legal form. If the danger to self-preservation was so severe that it required a *non*-delegated and *non*-commissioned form of rule, this meant that the internal juridical condition had dissolved altogether and a state of war had emerged within the former boundaries of the commonwealth.

Thus, constitutionalism narrowed the absolutist notion of an *exception* into a more circumscribed and contained theory of an *emergency*. Like the exception, an emergency requires some sort of extraordinary response. But in distinction to the exception, an emergency do not require rupturing the separation between sovereignty and delegated powers. Emergencies, unlike exceptions, can be overcome by forms of extraordinary power that nevertheless maintain the distinction between sovereignty and the institutions and agents controlling the coercive powers of the state. Emergencies, in other words, imply emergency powers, not absolutist sovereignty. Hence, although the term entered political discourse slowly from the 17th to 19th centuries and was not used by any of the authors considered here,³³² we could say that *emergencies themselves* were products of modern constitutionalism. In other words, the category of political events that are by definition unexpected, exceptional, temporary in duration, and pose an urgent threat emerged only in relation to a conception of legitimate political power that is by definition

³³² Harrington seems to be the first I have come across who uses the term “emergency” in reference to dictatorship or any equivalent institution. Although the (as far as I know) historical uniqueness of Harrington’s terminology also suggests the possibility that he was using the term in a more traditional sense, and its appearance in his discussion of dictatorship may have been coincidental. See, Harrington, J. and J. G. A. Pocock (1992). The commonwealth of Oceana ; and, A system of politics. Cambridge ; New York, NY, USA, Cambridge University Press.

authorized by general laws whose normativity is a product of purely human rather than theological or traditional sources. Unlike scholastic discussions of similar problems, emergencies in the modern sense reflected an idea of contingency that resisted synthesis within a hierarchically ordered universe of nature and divine higher law. And since they presupposed a problem that could only exist under the assumptions that all constituted power must be legally authorized, modern conceptions of both “emergencies” and emergency powers were in this sense a product of 17th and 18th century constitutionalism.

An institutional typology of emergency powers

That is, from the premise that we cannot *substantively* anticipate all potential “exceptions” to a system of norms, it concludes that we cannot *formally* anticipate such exceptions through procedures that are triggered by them. This distinction between procedure and substance is a key premise of emergency powers. The dynamics of such procedures, of course, vary according to different models of emergency powers. The most elementary procedural distinction, and one of the key areas of debate in the current literature, is between models of emergency powers deriving from the civil law tradition of republican dictatorship, and those deriving from the common law tradition of executive prerogative. As we shall see in the following section, these traditions are quite a bit more heterogeneous than the simple typology suggests. Nevertheless, it is useful to establish a basic typology at the outset between three institutional models of emergency powers:

dictatorship, extra-legal prerogative and constitutional prerogative. We can distinguish these models by the following characteristics:

- *Legal status.* Emergency powers can be authorized by a constitutional provision and/or a statute passed by the legislature granting temporary extraordinary authority. Or that authority may be exercised without any explicit authorization. Or it can be a temporary, extraordinary use of authority authorized by the ordinary constitutional powers of the executive.
- *Mode of investiture.* How is extraordinary authority granted to the agent possessing emergency powers, or (this amounts to the same thing), is the institution which declares the emergency the same as the institution empowered to act in an emergency? In the “hetero-investiture” model, the legislature must declare an emergency that invests an executive agent – either the ordinary chief executive or a special magistrate – with special emergency powers. In the “auto-investiture” model, the same agent – most likely the ordinary chief executive – both declares the emergency and is authorized to use special emergency powers.³³³
- *Mode of regulation.* How are emergency powers regulated, controlled or reviewed by ordinary authorities? The hetero-investiture model imposes “upstream” controls by lodging the power to declare an emergency and/or designate the official possessing emergency powers in different hands. Modes of “downstream” regulation empower other agents to review the use of emergency powers, either through judicial review, legislative acts of indemnification or popular controls of reelection or revolt.

³³³ I take the slightly awkward terms of “hetero-investiture” and “auto-investiture” from Pasquino and Ferejohn, “The Law of the Exception.”

- *Legitimate means.* The extraordinary means included in emergency powers may be procedurally limited in advance (for instance, citizens may only be detained without trial but not punished, or the emergency official may not legislate), determined by ordinary constitutional powers, or left to the prudence of the agent possessing emergency authority
- *Legitimate ends.* Limitations may be imposed by the purposes for which emergency powers are granted. For example, emergency powers may be restricted only to the end of restoring the status quo ante, or only actions that promote the public good, or the ends authorized by the ordinary constitutional authority granted to the agent acting in the emergency.

III. Prerogative as Emergency Power

The extra-legal prerogative

In the previous chapter I discussed dictatorship as an institutional model of emergency powers, focusing on Rousseau and Machiavelli. Here I want to turn to an institution that has been especially important in a common-law context has its origins in the royal prerogative. Like the

dictatorship, the origins of the prerogative can be traced to the Roman republic.³³⁴ Whereas the dictatorship, at least until the end of the 18th century was virtually synonymous with a non-sovereign emergency magistrate, the constitutional history of the prerogative overlaps only partially with the category. Moreover, its history is closely intertwined with the complex political theological origins of the concept of absolute sovereignty itself. The medieval origins of the royal prerogative in England derive from the granting of *plena potestas* of the communal estates in a royal assembly. In the 13th century, under the influence of Roman law and doctrines of *utilitas*, jurists argued that in a case of necessity or public utility that touched both king and kingdom, *status regis et regni* – usually in the context of a “just war” or invasion – all the various feudal representatives of the realm must give their assent in such assemblies to the measures required by the king in defense of the realm. In distinction to ‘courts ordinary,’ the king was said to appear in these extraordinary royal assemblies, or later prerogative courts, “in the fullness of his prerogative.”³³⁵ In this way prerogative was closely associated with what Kantorowicz referred to as the king’s “body politic,” expressing jurisdiction over the unity of his realm as “his royal Estate and Dignity.”³³⁶

Charles McIlwain has traced the subsequent development of the extraordinary or exceptional dimension of the prerogative in the dualism between the realms of *gubernaculum* and *jurisdictio* expressed by Bracton and other medieval legal scholars.³³⁷ In *jurisdictio*, “there are bounds to the king’s discretion established by a law that is positive and coercive, and a royal

³³⁴ Post, G. (1964). *Studies in medieval legal thought: public law and the state, 1100-1322*. Princeton, Princeton University Press.

³³⁵ Ibid., 111.

³³⁶ Kantorowicz, E. H. and American Council of Learned Societies. (1997). *The king's two bodies a study in mediaeval political theology*. Princeton paperbacks. Princeton, N.J., Princeton University Press., 9.

³³⁷ McIlwain, C. H. (1958). *Constitutionalism, ancient and modern*. Ithaca, N.Y., Great Seal Books. See also Pocock, *Machiavellian Moment*, chap. 2; Gierke, O. F. v. and F. W. Maitland (2001). *Political theories of the Middle Age*. Union, NJ, Lawbook Exchange., 35.

act beyond these bounds is *ultra vires*.³³⁸ Within *gubernaculum*, the king's prerogative over his realm is not subject to any such limitations; all royal restrictions are necessarily self-restrictions and can be legally dispensed with, since the king "has no peer, much less a superior" and is accountable only to God.³³⁹ In the conflicts that followed the succession of James I and his heirs, the boundaries between these domains became an arena of the explosive conflict between monarchy and parliament, and were at the center of both 17th century revolutions.

It comes as somewhat of a surprise, therefore, that John Locke – writing at a time when the powerful absolutist and theological-political resonances of the prerogative remained very much alive and vivid – appears to fully endorse the legitimacy of the prerogative in his radically anti-absolutist polemic, *The Second Treatise on Government*. Indeed, the chapter Locke devotes to the prerogative appears to be such an anomaly that traditional Locke scholarship overwhelmingly passed it over in silence, whereas the attention it received in the emergency powers literature was often badly distorted and out of context. Within the context of the constitutional debates over the prerogative that raged throughout the 1680s, however, it is easy to identify what is distinctive about Locke's discussion. The terms of the debate between royalists and parliamentarians were not qualitatively different from the dualism identified by McIlwain: even ardent parliamentarians attacked the crown on the grounds that it had *exceeded* the legitimate bounds within which the prerogative could be exercised.³⁴⁰ But they did not question its political-theological foundations that directly associated the prerogative with the regal person of the king. In other words, royalists and parliamentarians alike shared the assumption that the prerogative inhered intrinsically in the person of the king and that within its proper scope it was

³³⁸ McIlwain, 85.

³³⁹ Ibid.

³⁴⁰ see Malcolm, J. L. (1999). *The struggle for sovereignty : seventeenth-century English political tracts*. Indianapolis, Ind., Liberty Fund.; Morgan, E. S. (1989). *Inventing the people : the rise of popular sovereignty in England and America*. New York, Norton.

supreme; their debate – which was an extremely high stakes one – was limited to the boundaries established by the ancient constitution.

Locke made clean break with these assumptions.³⁴¹ Although he clearly has an English constitutional monarch in mind, he refers only to the “executive,” which is defined, like every other branch of the government, as a strictly *delegated* power, entrusted by the people for the sake of certain determinate ends. This shift from the two bodies inhering in the crown to the delegated authority of the executive is one of Locke’s most radical moves: it permanently severs the king’s two bodies, relocating the body politic to the united *community*, which does not itself govern but rather is the source of authority for any legitimate form of government whatsoever. The individual executive, therefore, becomes no more than a public office-holder, serving at the pleasure of the superior authority of the legislature, whose own authority is conditionally entrusted to it by the united power of the community. The executive’s prerogative, like all constituted political powers, is strictly a *commissioned* power. This theory of entrusted or commissioned powers has the important consequence of defining legitimate constituted powers *teleologically*, in terms of the ends for which executive and legislative powers were entrusted in the first place – namely, to act as fair and neutral judges, respect individual property rights and to serve the common good. This teleological criterion characterizes all political institutions of the government, and it defines the prerogative no less than any other. Thus, while Locke defines the prerogative as the executive’s power to act “where the law was silent, and sometimes too against the direct Letter of the Law,” he repeatedly emphasized the function and purpose of the

³⁴¹ As far as I can tell, he appears to be the only one – including for the most part his friend and ideological companion Tyrrell – to have done so in the 1670s and 80s. In this as in other respects, Locke distinguished himself from his parliamentary contemporaries by reviving and refining more radical republican arguments from the 1640s, and elevating the break with ancient constitutionalism entailed in these earlier writings with greater systematic and argumentative clarity and power. See Julian Franklin, *Locke’s Theory of Sovereignty* for an important example.

commission: the legitimate prerogative does not signify *any* sort of extra-legal action, but only when that action is necessary for the promotion of the public good, the ultimate judge of which is the people themselves.³⁴² Hence prerogative, for the first time, could be regarded as a commission in this functional sense as well.

As the source of this delegated power, the united community retains the inalienable right to judge whether those ends are being promoted, and therefore, determine for itself when rulers are no longer legitimate officeholders but tyrants and usurpers that must be opposed by violence.³⁴³ Extra-legal action that is *contrary* to the private good – as Locke’s parliamentary allies claimed of Charles II and James II – was therefore not a prerogative power at all but tyranny, triggering the right to resist. There are essentially two steps that Locke envisions to control improper or illegitimate use of the prerogative, the first institutional and the second extra-institutional. First, if the legislative power, once assembled, judges an extra-legal action of the executive as contrary to the common good and the legitimate ends of government, the judgment of the assembled legislature, *not* that of the executive, is authoritative.³⁴⁴ Secondly, in the event that a dispute arises between the branches and the executive refuses to assemble the legislature, the result is the same as if the legislature itself exceeds its authority. In either case, the fundamental purpose of government to act as a neutral authoritative judge between disputants is

³⁴² It is remarkable how frequently Locke is misread on this point, both by liberal defenders of emergency powers and by radical critics of liberalism. A good example of the former is Clement Fatovic, whose interpretation of Locke’s prerogative is exactly the opposite of mine, as evidence for Fatovic that liberalism is compatible with a large degree of discretionary, personalistic power of the executive. Even as insightful and otherwise precise interpreter as Pasquale Pasquino tends to read chapter 14 in isolation from the rest of the text, distorting some key passages... Perhaps the most egregious of all is Mark Neocleous, who, in a work otherwise full of penetrating insights, interprets the whole of Locke through a distorted reading of the prerogative, leading him to reject even the view that Locke supports the right to resist. For a similar misinterpretation see Wolin, S. S. (1989). The presence of the past : essays on the state and the Constitution. Baltimore, Johns Hopkins University Press.

³⁴³ Here Locke fully coincides with his more radical, republican contemporary Sidney, A. and T. G. West (1996). Discourses concerning government. Indianapolis, Liberty Fund. Chap. II, section 24, 221.

³⁴⁴ Locke, *Second Treatise*, The executive is “ministerial and subordinate to the legislative,” which is the supreme constituted authority in the commonwealth. When the legislature delegates the power to execute the laws “into other hands, they have a power still to resume it out of those hands, when they find cause, and to punish for any maladministration against the Laws.” ¶153.

no longer fulfilled, and in the absence of any rightful, neutral judge on earth, the people have no remedy but to “appeal to Heaven” and take up arms against their oppressors.³⁴⁵ This move allows Locke appropriate the most powerful weapon in the arsenal his royalist opponents – the prerogative itself – as yet another argument for the legitimacy of resistance against Stewart absolutism.³⁴⁶

But Locke’s redefinition had another decisive consequence that transcended its immediate political context. For the first time, Locke makes the prerogative into a straightforward institution of *emergency powers*.³⁴⁷ In stripping the political-theological character of the prerogative that made it inhere to the person of the king, Locke defines it *functionally*, in terms of the purpose it serves rather than the sovereign jurisdiction it expresses. In this newly disenchanted form, its justification now lies in the special purpose it can serve within a constitutional system of rule through general, “promulgated, standing laws” and not “extemporary dictates and undetermined resolutions.”³⁴⁸ The supremacy of general and abstract laws ironically also highlighted the role of flux, contingency and unforeseeable particulars in political life. In the paragraph leading up to his first definition of the prerogative, he observes the “things of this world are in so constant a flux, that nothing remains in the same state,” which can easily overwhelm and undermine unchanging constitutional rules and procedures.³⁴⁹ These are the circumstances where the prerogative plays a necessary role.

The *function* of the prerogative, then, is in this sense a creation of the imperative that political power must be expressed through general laws and constitutional procedures. For

³⁴⁵ Ibid., ¶168.

³⁴⁶ Ibid., ¶155

³⁴⁷ Other 17th century English authors who shared Locke’s position on the political spectrum tended to pass over the prerogative altogether, and sometimes included a discussion of the straightforwardly republican institution of dictatorship, about which Locke is silent.

³⁴⁸ Locke, *Second Treatise*, ¶ 137-8.

³⁴⁹ Ibid., ¶157.

Locke, constitutionalism is constitutive of the epistemic, temporal and self-preservation dimensions of emergencies:

For since in some Governments the Law-making Power is not always in being, and is usually too numerous, and so too slow, for the dispatch requisite to Execution: and because also it is impossible to foresee, and so by laws to provide for, all Accidents and Necessities, that may concern the public; ... therefore there is a latitude left to the Executive power, to do many things of choice, which the Laws do not prescribe [provided it is necessary for the common good].³⁵⁰

The idea is a very familiar one. Laws, in order to constitute a space of juridical freedom for all legal subjects, must be abstract, general and relatively unchanging. The *purpose* of the state or political community as a whole, however, is not just the legal order considered narrowly, but the overall public security and common good expressed in it. Securing these ends sometimes requires responding to the occasional contingent and unpredictable situation that cannot be anticipated by general laws, or that emerges too quickly for the ordinary procedures of constitutional government. This disjuncture points to a space between the *ends* of government – securing the rights, liberty and wellbeing of the political community – and the *means* of government, expressed through the separation of powers, limited legislative supremacy over the executive and the requirement of standing and general laws. Locke redefines prerogative to fill this gap. We should be cautious to avoid the mistaken assumption made by many interpreters that Locke had in mind only moments of drastic danger and existential crisis.³⁵¹ Most of the

³⁵⁰ Ibid., ¶ 160

³⁵¹ see Corwin, E. S. and L. W. Koenig (1956). *The Presidency today*. New York, New York University Press.; Rossiter, *Constitutional Dictatorship*; Mansfield, H. C. (1993). *Taming the prince : the ambivalence of modern executive power*. Baltimore, Johns Hopkins University Press.; Gross, *Law in Times of Crisis*; Fatovic, *Outside the Law*; to some extent Pasquino, P. (1998). "Locke on King's Prerogative." *Political Theory* 26(2).

examples Locke gives are considerably more mundane and refer only to the epistemic and temporal criteria without self-preservation. This suggests that Locke seems to have envisioned the prerogative as an ordinary administrative as well as an emergency institution in the full sense.³⁵² In both cases, however, the teleological criteria is the same, as is the threat of revolution in response to serious abuses.³⁵³

While Locke explicitly states that the prerogative may be used outside and even against the law, I would nevertheless suggest that the prerogative is constitutionalist in a broad sense, rather than operating in some legal vacuum or black hole. We've already seen three reasons why Locke's prerogative cannot be assimilated to the Schmittean decisionist sovereign: first, because it is a commissioned power constituted by the terms of its commission; second, because it is a power of an *office*, explicitly detached from the person or agent who exercises it, and third, because the validity of the prerogative remains subject to the judgment of the community for whose sake it is authorized, and who decides in the last instance whether it is a legitimate prerogative or an illegal act of tyranny. To these we can add a fourth reason: prerogative is exercised in an environment in which legality does not consist exclusively or even primarily in positive, statutory laws. In contrast to the radical natural law minimalism of Hobbes or Kant, for Locke the content of natural law is relatively thick, yielding a deeper convergence on moral and legal principles among any community of rational individuals. Thus, natural law persists after the

³⁵² For instance, correcting disproportionate representation in districts (§158), assembling the legislature (§167), and pardoning cases in which the letter of the law is excessively harsh (§159, 160). Locke's example of the destruction of a neighboring house in order to stop a fire, has usually been cited as an example of emergency powers in the full sense, but this seems to be a misinterpretation. Locke's example refers to a *private person* who commits the *crime* of destroying his neighbor's house in a fire, not an executive exercising emergency powers. In such cases, "a strict and rigid observation of the Laws" may do harm by penalizing "an action that may deserve reward and pardon." In other words, Locke's example is of the pardoning power. The fact that Locke's clear statement – "'tis fit [in circumstances analogous to the burning building] to mitigate the severity of the Law, and pardon some Offenders – has been so frequently overlooked is indicative of the insistence of many interpreters to read this chapter as a drastic defense of *raison d'état* and even sovereign decisionism.

³⁵³ Ibid., §166-7.

exit from the state of nature and permeates political society, serving as a standard for all members of the community with which all activities of political rulers must harmonize.³⁵⁴ Just as the duty of the legislature is to interpret and translate the content of natural law into more concrete conditions, so the executive, in executing the laws of parliament, is equally executing the law of nature. Hence, if an existing law happens to contradict the law of nature, the executive is acting fully within his lawful authority if he disregards or alters it, allowing the legislature to reassume its proper role. From a legal positivist perspective, *salus populi suprema lex* may indeed sound analogous to a legal break, but it is legitimate to assume that Locke understood *suprema lex* literally: prerogative may be in abeyance of statutory law but not of law as such. Nor was the idea of the public good as supreme law a synonym for the will of the executive; Locke's entire theory rests on the fundamental conviction that there is an underlying source of legality more fundamental than positive law, and that this source is available and knowable to every rational being, and therefore that the executive's interpretation of natural law is neither exclusive nor supreme.

Banishing sovereignty?

I've argued that Locke attempted to disassociate the institution of the prerogative from personified sovereignty as fully as possible by redescribing it as a delegated and circumscribed commission, restricted to the purposes for which it was created and subject to the superior ex-post judgment of the legislative branch and, in the extreme case, the community itself. In all of these respects, his theory of prerogative reflects Locke's more general commitment to banishing sovereignty from within the commonwealth altogether. Indeed, Locke even scrupulously avoids

³⁵⁴ Ibid.

using the word sovereignty throughout the *Second Treatise*. However, we should not conclude from this linguistic avoidance that Locke dismissed the practical problem of external sovereign personhood, nor should we imagine that he was quite as successful in seamlessly exiling sovereignty to the external sphere as his language suggested. Locke's attempts to subdue these difficulties arise especially in relation to the executive, resulting in the *Second Treatise*'s peculiar and rather strained distinction between executive, federative and prerogative power.

What is puzzling is that the executive, the federative and prerogative power are all "united," for Locke, in the same person – the constitutional monarch. The distinction is not among different institutions or organs, but among functions of the same institution or, effectively, of the same single monarch. The executive power is introduced shortly after Locke declares the legislature the "supreme power of the common wealth," entrusted by the community with the united force of the commonwealth, and the exclusive right to legislate for it. The executive is described as wholly subordinate and inferior to the legislature. Even in those systems, like England, in which law-making requires the consent of the executive along with the legislature, the executive alone should be properly regarded as subordinate to the corporate body of king-in-parliament which makes law.³⁵⁵ Even allowing that such a monarch, without any superior legislative branch, may be regarded as supreme within the government, Locke sharply insists that not only are the constitutional laws of the commonwealth fully binding on him, more fundamentally constitutional laws are constitutive of the office of the executive or monarch in the first place.

But yet it is to be observed, that tho' oaths of allegiance and fealty are taken to him, it is not to him as supreme legislator, but as supreme executor of the law, made by a joint power of him with others;

³⁵⁵ *ibid.*, § 151

allegiance being nothing but an obedience according to law, which when he violates, he has no right to obedience, nor can claim it otherwise than as the public person vested with the power of the law... But when he quits this representation, this public will, and acts by his own private will, he degrades himself, and is but a single private person without power, and without will, that has any right to obedience; the members owing no obedience but to the public will of the society.

The monarch is an office, constituted by law. The moment the executive begins to act beyond his legal authorization, he ceases to exercise legitimate political power, and forsakes any claims to obedience from the members of the community.

In the same passage, however, Locke writes that as a “public person,” whose voice is the voice of the law and whose will is the will of the public, he “is to be considered as the image, phantom, or representative of the common-wealth.” Locke’s repeated references to “representation” here appear to have more in common with Hobbes than with the theory of mixed government, and do appear to acknowledge a formal embodiment role, albeit a limited one, for the monarch. While this remains only a suggestion for executive power, it constitutes the essence of federative power. Whereas executive power is entrusted to execute the laws passed by the legislature *within* the commonwealth, the federative power represents and acts for the unity of the commonwealth *externally*, vis-à-vis other states.

for though in a common-wealth the members of it are distinct persons still in reference to one another, and as such as governed by the laws of the society; in reference to the rest of Mankind, [the members of a commonwealth] make one Body, which is, as every member of it before was, still in the State of Nature with the rest of Mankind. Hence it is, that the Controversies that happen between any Many of the Society with those that are out of it, are managed by the publick; and an injury done to a Member of their Body,

engages the whole in the reparation of it. So that under this Consideration, the whole Community is one Body in the State of Nature, in respect of all other States or Persons out of its Community.

The federative power, then, “contains” the classic powers of external sovereignty: “the power of war and peace, leagues and alliances, and all the transactions, with all persons and communities without the common-wealth.” These characteristics of external unified sovereignty adhere in the person who represents the community as a political unity or “one body” vis-à-vis other sovereign persons. Locke explicitly contrasts the legally determined relations of each individual member of the commonwealth with one another, versus the unregulated external relations among sovereign collectivities. While the former is volunarist and contractual, reflecting the rational consent and legal self-determination of all citizens, the latter is in the state of nature, undetermined by positive law, and non-voluntarist or contractual from the perspective of the individual subject. For exactly this reason Locke states that the power of the external representative of the commonwealth is not political but “*natural*, because it is that which answers to the Power every Man naturally had before he entred into Society,” i.e. the natural rights to self-preservation and punishment of crimes against natural law held by each individual in the state of nature.³⁵⁶

As a natural rather than a political power, it is radically different from any internal power of government in that it is neither delegated nor legally constituted, as are the internal legislative and executive powers.³⁵⁷ Moreover, in contrast to the superior power of the legislature, it is not bound by promulgated and standing laws but based on discretion and prudence, unencumbered by general laws. In even greater contrast to the internal executive, which is explicitly inferior and has no will of its own, the federative power possesses its own will and judgment to interpret the

³⁵⁶ *ibid.*, ¶ 145.

³⁵⁷ *Ibid.*, ¶ 105-10

law of nature in all matters outside the commonwealth.³⁵⁸ Thus, in a somewhat astonishing passage, Locke observes that

though this federative power in the well or ill management of it be of great moment to the common-wealth, yet it is much less capable to be directed by antecedent, standing, positive laws, than the executive; and so must necessarily be left to the prudence and wisdom of those, whose hands it is in, to be managed for the public good: for the laws that concern subjects one amongst another, being to direct their actions, may well enough precede them. But what is to be done in reference to foreigners, depending much upon their actions, and the variation of designs and interests, must be left in great part to the prudence of those, who have this power committed to them, to be managed by the best of their skill, for the advantage of the common-wealth.³⁵⁹

Especially considering Locke's elaborate and thorough redefinition and subordination of the internal prerogative, this frank acceptance of unconstrained sovereign discretion in external affairs is startling. After struggling mightily against any appearance of personified sovereignty internally, Locke appears to have bit the bullet and accepted the full consequences of unified external sovereignty. Indeed, he appears to show his disapprobation only by remaining consistent in his refusal to apply the term sovereignty to his description. Thus, after listing the classic "marks" of external sovereignty – the rights of war and peace, leagues, alliances and treaty-

³⁵⁸ The inadequacy of depending upon any interpretation of the law of nature alone, without additional positive juridical safeguards, is of course the very reason why civil power is constituted in the first place: "The *Legislative*, or Supream Authority, cannot assume to its self a power to Rule by extemporary Arbitrary Decrees, but *is bound to dispense Justice*, and decide the Rights of the Subject *by promulgated standing Laws, and known Authoris'd Judges*. For the Law of Nature being unwritten, and so no where to be found but in the minds of Men, they who through Passion or Interest shall mis-cite, or misapply it, cannot so easily be convinced of their mistake where there is no establish'd Judge" (§136).

³⁵⁹ ¶147

making with other sovereign states, etc. – Locke courtly asserts that these powers “may be called federative, if any one pleases. So the thing be understood, I am indifferent as to the name.”

Few readers, from the 18th century to the present,³⁶⁰ have been convinced by Locke’s repeated insistence that these powers, though possessed by a single person, “be really distinct in themselves.” Why did Locke insist on such an awkward and seemingly nebulous distinction of functions rather than institutions? One possible reason is suggested by our theme in this chapter: Locke’s entire constitutionalist project rested upon his ability to distinguish sovereignty from any particular domestic institutional embodiment, and therefore to maintain the watertight distinction between the internal and external faces of sovereignty. If we adopt Locke’s functionalist perspective, this distinction really does make theoretical sense. Executive power has the function of faithfully executing the laws passed by the supreme power of the legislature. It is a delegated, limited power based on trust and rational consent. As we’ve seen, the federative power is discretionary and unregulated rather than law-governed and accountable. It substitutes Hobbesian representation and embodiment for Lockean entrusted delegation and consent. While of fundamental importance for any member of a commonwealth, Locke does not seem to regard it as accountable to the community and hence, it falls outside the relations of political trust and judgment that constitute the relations between the government and citizens. Thus, in terms of *powers* themselves, the executive and the federative are indeed quite distinct. Moreover, whereas some interpreters have assimilated the prerogative to the federative, Locke seems clear that he regards the prerogative as a power of the executive *only*, and not of the federative. Again, adopting the functionalist rather than institutionalist perspective, this too makes sense. The

³⁶⁰ examples: Madison, *Pacificus/Helvidious Letters*, “first letter of Helvidious,” available online at http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php?title=1910&Itemid=27; William Blackstone, *Commentaries* ed. John Bethune Bayly (Saunders and Benning: London, 1840), chap. XVII, 255; then Vile, *Constitutionalism and the Separation of Powers*; Neumann, *The Rule of Law*, 120; Wolin, *The Persistence of the Past*; Neocleous, *Critique of Security*.

prerogative by definition is an exceptional, emergency power. It refers to circumstances that are unforeseen by general and abstract laws, in which the *ordinarily law-governed executive*, who has no will of his own, must substitute his own discretion for the law in a particular case, when the common good requires it. The federative, in contrast, has full discretionary powers already, unconstrained by any positive law, and therefore has no need of emergency powers such as the prerogative that temporarily suspend the requirement of legal authorization.

The constitutional prerogative

Locke's functionalist strategy of disassociating the prerogative from any powers inhering in the person of the executive, and defining it in close proximity to the right to resist, does not seem to have gained much traction in post-1688 theories of the constitutional monarch. Its periodic reemergence in the republicanized monarch of the US presidency is another story, as we shall see in later chapters. While most 18th century English scholars distanced themselves, for obvious reasons, from Locke's radicalism, subsequent 18th century accounts retained the role of the prerogative as a form of emergency powers in addition to the more ordinary administrative or discretionary powers it entailed. More authoritarian 18th century liberal philosophers such as Hume or jurists such as Blackstone reinstated the discretionary powers of the prerogative inherent in the king's person as an ordinary feature of the English constitutional system. In this way, the prerogative continued to include a form of emergency powers necessary for responding to urgent, unforeseen crises. But by relocating it within the constitution, it ceased to be an exceptional power and became normalized. But this is not to say that either Hume or Blackstone's prerogative marked a retreat to the absolutist position. Blackstone's strategy, for example, of constitutionalizing the prerogative allows him to specify in much greater detail the

precise boundaries and limits within which the prerogative is supreme, in contrast to Locke's open-ended and intrinsically unspecifiable criteria.

Writing in the 1760s, Blackstone's simultaneous commitment, on the one hand, for an unqualified assertion of the principles of the rule of law, and on the other, for a unmistakable degree of discretionary executive authority lodged in the person of the monarch. These seemingly contradictory commitments are made to coexist through a subtle legal strategy of maintaining the political-theological constitutional forms of the royal prerogative, while at the same time emptying their absolutist political content through an array of methods of legal disenchantment and depersonification.

Reflecting the redefinition of the common law through the natural right tradition we have been discussing, Blackstone begins the *Commentaries* by distinguish civil or municipal law from the unwritten natural law imperfectly knowable by reason, and the law of nations consisting of mutual compacts and natural law. In contrast to these first two, Blackstone defines municipal – or positive – law as “a rule of civil conduct prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong.”³⁶¹ Thus, sovereignty, or the supreme power in a state, is exclusive locus of lawmaking authority.³⁶² Blackstone effectively incorporates the Hobbesian and Lockean definitions of crime through his differentiation, within the category of crime, between *mala in se* and *mala prohibita*.

Hence, the state's right to punish *mala in se* is depicted in openly Lockean terms:

The right of the temporal legislature to inflict discretionary penalties for crimes against the law of nature, which in a state of nature is vested in *all* mankind, is in a state of society transferred from individuals to the

³⁶¹ William Blackstone, *Commentaries on the Laws of England*, ed. John Bethune Bayly (Saunders and Benning: London, 1840), 2.

³⁶² *Ibid.*, 3

sovereign power, whereby men are prevented from being judges in their own causes, an evil which civil government was intended to remedy. Whatever power, therefore, individuals had of punishing offences against the law of nature, is now vested in the magistrate alone, who bears the sword of justice by the consent of the whole community.³⁶³

In addition, Blackstone also argued that the state may legitimately inflict coercive penalties for crimes that are “in themselves indifferent, and become either right or wrong, just or unjust” only by virtue of being declared so by a positive law.³⁶⁴ The state’s right in this case is established by the fact that “the law by which individuals suffer was made by [the subjects’] own consent, it being a part of the original contract into which they entered when first they engaged in society.”³⁶⁵

In either case, for Blackstone the supremacy of civil law, and therefore of the supreme legislative power, is constitutive of state and nationhood. After declaring this Hobbesian principle of a single, supreme sovereign power, Blackstone nevertheless assumes that it can be divided at least internally: in England, the supreme power in the kingdom “in whom the sovereign power of the state resides” is “divided into two branches; the one legislative, consisting of king, lords and commons, the other, executive, consisting of the king alone.”³⁶⁶ When parliament is assembled, the three estates together constitute “the great corporation or body politic of the kingdom,” whose power and jurisdiction is “so transcendent and absolute that it cannot be confined either for causes or persons.”³⁶⁷ While the king is the “head” of this

³⁶³ *ibid.*, 486

³⁶⁴ *ibid.*, 3

³⁶⁵ *ibid.*, 486-7.

³⁶⁶ *Ibid.*, 22

³⁶⁷ i.e. like Hobbes’ and Rousseau’s sovereign, parliament’s power is both inherently legal, and necessarily unbound by law. 23-4. Blackstone, *ibid.*, quoting Fortescue, asserts that parliament is “so high and mighty in its nature, that it may make law; and that which is law it may make no law; and the determination and knowledge of that privilege belongs to the lords or parliament, and not to the justices,” 25.

artificial body, he has no lawmaking powers on his own, and within parliament only possesses a negative, veto power.³⁶⁸

Turning to the powers of the crown, Blackwell seems to confirm the supremacy of parliament and the rule of law over the powers of the king:

The principal duty of the king is to govern his people according to law. The power of kings should be neither free nor unlimited. This is not only consonant to the principles of nature, of liberty of reason, and of society, but has always been esteemed an express part of the common law of England, even when prerogative was at the highest... The king is bound to execute these duties by the terms of the original contract between him and his people as couched in the coronation oath.³⁶⁹

Despite this duty, Blackstone's king bears little resemblance to the delegated and formally inferior executive powers in the republican theories of Locke and Rousseau. Like Locke, for Blackstone the king possesses prerogative powers, but these powers differ from Locke's in two fundamental respects that are both summarized in Blackstone's assertion that "The law ascribes to the king the attribute of sovereignty or pre-eminence." The first fundamental difference, of course, is that whereas for Locke the king, like all constituted powers, is strictly delegated and possesses no rights to authority other than those conditionally entrusted to him by the community. The second fundamental difference, which is reflected in the careful phrasing of Blackstone's sentence, is that the *attribute* of sovereignty is ascribed to the king by *the law*: the

³⁶⁸ Ibid., The King's negative rather than positive lawmaking power means that taken individually, "the crown has not any power of *doing* wrong, but merely of *preventing* wrong from being done," 23.

³⁶⁹ Ibid., 40-1.

king's prerogative legally authorized and the attribute of sovereignty it expresses has a wholly *legal* character.

These fundamental differences have a number of important consequences. First, we saw how Locke's teleological definition of the prerogative detached it from the king's royal person and even his public office, making the status of "prerogative" – and hence the legitimacy of the king's actions – wholly contingent upon whether they are orientated toward the public good (judged ultimately by the people themselves). In contrast, Blackstone states that the king possesses the prerogative "in right of his regal dignity," making prerogatives "rooted in and spring from the king's political person" either directly or incidentally.³⁷⁰ The king's legal attribute of sovereign preeminence means that he has no legal superiors, and therefore no court can have jurisdiction over him. For this reason, in diametrical contrast to Locke, all actions within his legal sovereignty must be regarded as rightful, irrespective of the purposes for which they are used. Hence, Blackstone can assert that because no court can have jurisdiction over him, "the person of the king is sacred though his measures be tyrannical," that he is incapable of misusing his powers or committing a wrong (though his ministers may be found culpable), that he can have "no stain or corruption of blood," and so on.³⁷¹

The second consequence is that the legal character of the prerogative allows Blackstone to specify in much greater detail the precise boundaries and limits within which the prerogative is supreme. Locke functionally redefined the prerogative as a mechanism for supplementing the inability of general laws to foresee and apply itself to sudden and exceptional events. As a means for dealing with irreducible particulars, the concrete boundaries of the prerogative were by nature open-ended, contingent and difficult to specify in advance. In contrast, Blackstone can refine and

³⁷⁰ Prerogatives directly related to the king's political person are exclusive, unshared powers, whereas those that are indirectly related are *exceptions* to general rules that apply to everyone but the king. Ibid., 41.

³⁷¹ Ibid., 42

predetermine the precise boundaries of the prerogative by tracing the contours of the law's attribution of preeminence upon which it is dependent.³⁷² In many cases, Blackstone appears to be employing the legal character of the prerogative to subtly differentiate king's formal from his actual powers, normalizing and restraining the latter while transforming the former into inactive juridical presuppositions, or even symbols for the supremacy of the law itself. Hence, he hails the king as the fountain of justice, "not the spring, but the reservoir, from whence right and equity are conducted" to all his subjects; all public offenses in the kingdom are immediately offences against his person, and therefore is legally ubiquitous, ever present in all his courts, and so on. The practical consequence of all this is much more modest: the king is formally named plaintiff in all criminal prosecutions, though he is exempted from the (physically impossible) obligation having to show up in court.³⁷³ Likewise, the king enjoys the exclusive prerogative of issuing proclamations that are binding on any subject. However, these turn out to be binding only "where they do not either contradict the old laws or tend to establish new ones, but only enforce the execution of such laws as are already in being." Even more shrewdly, Blackstone declares that while "the supposition of the *law* is" that the king is personally incapable of wrongdoing, this means that his powers can only be abused through "the advice of evil counselors, or ministers," who can be punished and held accountable by parliament.³⁷⁴ In these and other

³⁷² So for example, the king "may reject bills make treaties, coin money, create peers, pardon offences as he pleases: unless where the constitution has expressly, or by evident consequence, laid down some exception or boundary," or again, the king "is not bound by any act of parliament, unless he be named therein, except where such act is expressly made for the preservation of public rights and the suppression of public wrongs, and does not interfere with the established rights the crown," etc., *ibid.*, 42, 43.

³⁷³ *Ibid.*, 44. As probably befits the archetypical lawyerly study, many of the various powers of the prerogative, after being proclaimed in thunderous and awesome terms, lead straight to into a thicket of eye-glazingly mundane legal detail: In addition to being "generalissimo, or first in military command," we learn that "The erection of beacons, lighthouses and sea marks, is also a branch of the royal prerogative, but which is usually vested by letters patent in the lord high admiral. By 8 Eliz. C. 13, a similar power is given to the corporation of the Trinity House (*a*)," etc.

³⁷⁴ *ibid.*, 42. For an excellent account of parliament's use of the same legal device in the English revolution, see Morgan. Blackstone also points out that if there is "in point of property, a just demand" upon the king, "the chancellor will, upon petition, administer right as a matter of grace, though not upon compulsion."

examples, the sovereignty and preeminence of the crown are carefully projected into a symbolic sphere in which their very preeminence becomes an obstacle to the ability of individual kings to employ their prerogatives for their own political advantage.

The third major consequence of Blackstone's strategy of normalizing and legalizing the prerogative is that it undermines the purpose, as well as the coherence, of Locke's careful distinction between the *ordinary* federative powers that are inherent in the office, and *extraordinary* prerogatives of the executive that are defined functionally. Blackstone simply adds the representation of external sovereignty, and hence the powers of war and peace, another of the legal attributes of sovereignty enjoyed by the king. These powers are an important reminder that Blackstone's monarch may be constitutional, but is very far from a merely symbolic head of state. The prerogatives of war and peace follow directly from principles

held by all the writers on the law of nature and nations, that the right of making war, which by nature subsisted in every individual, is given up by all private persons that enter into society, and is vested in the sovereign power: and this right is given up, not only by individuals, but even by the entire body of people, that are under the dominion of a sovereign.³⁷⁵

In these straightforwardly Grotian and Hobbesian terms, Blackstone asserts that

With regard to foreign concerns, the king is the delegate or representative of his people... In the king, therefore, as in a center, all the rays of his people are united, and form by that union a consistency, splendor, and power, that make him feared and respected by foreign potentates; who would scruple to enter into any engagement, that must afterwards be revised and ratified by a popular assembly. What is done by

³⁷⁵ Ibid., 275

the royal authority, with regard to foreign powers, is the act of the whole nation: what is done without the king's concurrence is the act only of private men.³⁷⁶

On these premises, Blackstone regarded it as obvious that unified sovereign personhood must be represented by a single person, and placing this representation in the hands of an assembly or collectivity would disqualify a nation even from recognition by other civilized nations.³⁷⁷ While Blackstone does not shy away from the consequences of this argument, it is important to emphasize that, nomenclature aside, Locke reached exactly the same conclusions in his discussion of federative power. Moreover, if Locke could imagine nothing short of the admittedly exceptional and infrequent threat of revolution to prevent abuses of the prerogative, his federative power is even more insulated from political accountability. Because it was exercised by a political power within the commonwealth, the exceptional character of Locke's prerogative made it at least highly visible and exposed to public judgment. But avoiding a theory of sovereignty meant that he had to define the federative power as natural rather than political, and hence not even criticizable on the grounds of rational consent. Blackstone undoubtedly displays a more authoritarian and conservative temperament than the author of the *Second Treatise*, but including foreign and domestic powers of the prerogative together at least renders them equally visible as forms of *political* power. Moreover, it also allows Blackstone to cautiously assert the same legal measures of accountability to the external prerogatives as he applied to the internal ones. Thus, even in regard to the "great" prerogatives of war and peace, he again "hints" that

³⁷⁶ *ibid.*, 375

³⁷⁷ "It is impossible that the individuals of a state in their collective capacity, can transact the affairs of that state with another community equally numerous as themselves. Unanimity must be wanting to their measures, and strength to the execution of their counsels," *ibid.*, 375.

lest this yet plenitude of authority should be abused to the detriment of the public, the constitution (as was hinted before) hath here interposed a check, by the means of parliamentary impeachment, for the punishment of such ministers as from criminal motives advise or conclude any treaty which shall afterwards be judged to derogate from the honor and interest of the nation.³⁷⁸

Not only, therefore, does Blackstone collapse the Lockean Federative power back into the prerogative, he grants the prerogative a legal and constitutional status that indirectly subjects even external sovereignty to legal and political oversight.

In what sense, then, is Blackstone's prerogative a theory of *emergency* powers? Insofar as the upshot of his efforts is a move toward the integration of the royal prerogative into the ordinary constitutional system of near- parliamentary supremacy, the prerogative is less of a clear-cut example of emergency powers than including a power, discretionary executive within the *normal* constitutional framework. On the other hand, insofar as the prerogative still functions as a linchpin mediating the distinction between internal and external sovereignty, and the paradigms of crime and war, the claim to exceptional discretionary powers that are legally domesticated during ordinary times may become once again reactivated. In addition to the personification of external sovereignty, we've seen examples of how Blackstone maintains the possibility of reactivating exceptional remnants of the pre-1688 link between prerogative and personified sovereignty in cases of internal emergency.³⁷⁹

³⁷⁸ Ibid., 381.

³⁷⁹ So for example, the king "may reject bills make treaties, coin money, create peers, pardon offences as he pleases: unless where the constitution has expressly, or by evident consequence, laid down some exception or boundary," or again, the king "is not bound by any act of parliament, unless he be named therein, except where such act is expressly made for the preservation of public rights and the suppression of public wrongs, and does not interfere with the established rights the crown," etc., *ibid.*, 42, 43.

Thus, even as Blackstone subtly normalizes and transforms the remnants of personified sovereignty in the prerogative into symbols of the depersonified sovereignty of the legal order, at the same time, its constitutional powers are potentially in reserve in cases of disorder or turmoil that require an exceptional response. While the authoritarian dimension of the constitutionalized prerogative is unmistakable, Blackstone's subtle strategy of depersonification when the discretionary powers of the executive are not required gives the prerogative a distinctively liberal rather than absolutist character. In other words, the constitutionalized prerogative is a species of emergency powers rather than exceptionalism.

IV. Empire, Dominion and the Return of the Exception

To state my thesis once more, constitutional theories of emergency powers help maintain the distinction between internal and external orders by providing an alternative, commissioned institution for the means of self-preservation inside the state. By distinguishing even exceptional internal powers from sovereignty, they aim to exclusively relegate the unified personification of sovereignty to the external sphere and banish all personifications or institutional embodiments of sovereignty from the internal life of the polity. How successful have the constitutional models of the prerogative been at this task?

Returning to Locke, I argued that his otherwise puzzling distinctions between executive, federative and prerogative powers, which he treats as separate and distinct powers even though all three belong to the same organ, are in fact reflections of the separate domains of internal, external, and emergency powers. Of course, even if we agree that it may be theoretically coherent in terms of function, it nevertheless raises a troubling question about its political

implications: can the formal distinction between functions that are “almost always united” in the same person serve as an adequate basis for preventing the practical fusion of internal and external sovereignty in the person in whom they are both vested? The person of the monarch exemplifies the potential of certain key institutions or powers to serve as a hinge between the internal and the external, conveying the prerogatives of unified sovereignty into domestic imperatives that claim priority over any normative restriction. Or, such institutions could act as a wedge between the internal and the external, expanding the jurisdiction of the realm of external discretion and contracting the realm of legally constrained and accountable government, so that the division between inside and outside is upheld at the price of the progressive colonization of the former by the latter. Or, to cite one more possibility, the mixture of external plenary power and internal restrictions in the same person could prove explosive, creating a constitutionally limited power, and linking that power together with the physical means and political incentives to violate its own limits.

The dangers, then, are clear both in abstract and from the few generations of English constitutional history preceding the *Second Treatise*. Why did Locke accept an essentially Hobbesian account of the absoluteness of external sovereignty into his constitutional theory, at the price not only of removing external affairs entirely from political accountability, but also exposing his domestic constitutional project to such an unpredictable and explosive mixture, transforming his constitutionalized monarch into a Trojan horse of absolutist sovereign personhood?

Contemporary Alternatives

One possible answer to this question is that the absolutist assumptions built into Locke's Federative power was a consequence of Locke's explicit agreement with the Hobbesian account of external sovereignty and the law of nations, and Locke's conscious rejection of the anti-absolutist alternative accounts presented by some of Hobbes' critics. Like Hobbes and in opposition to Hobbes' critics, Locke was very keen to establish an account of external sovereignty consistent with the foreign policy of an aggressive, autonomous state, with the right to interpret the laws of nature for itself in justification of offensive war. Perhaps most importantly, Locke was strongly committed to an account of external sovereignty that included the right to seize uncultivated land, and denied jurisdiction to indigenous occupants of territory that had not been brought into private ownership. Such commitments, as Richard Tuck and others have argued, help explain Locke's hostility toward the non-absolutist, legally constrained accounts of external sovereignty asserted by critics of Hobbes such as Samuel Pufendorf.³⁸⁰ At the core of Locke's polemic toward Pufendorf, I want to argue, is the link between absolute external sovereignty, land appropriation and imperial expansion.

A brief contrast between Locke's account and the alternative presented by Pufendorf can clarify Locke's commitment to an aggressively unconstrained theory of external sovereignty, even at the price of having to resort to the peculiar executive/federative distinction we've been

³⁸⁰ Tuck, *Rights of War and Peace*, 167, 177. See also Tully, J. (1995). *Strange multiplicity : constitutionalism in an age of diversity*. Cambridge ; New York, Cambridge University Press. The first John Robert Seeley lectures, given by James Tully in 1994, address the six types of demands for cultural recognition that constitute the most intractable conflicts of the present age: supranational associations, nationalism and federalism, linguistic and ethnic minorities, feminism, multiculturalism and Aboriginal self government. Neither the prevailing schools of modern Western constitutionalism nor post-modern constitutionalism provide a just way of adjudicating such diverse claims to recognition because they rest on untenable assumptions inherited from the age of European imperialism. However, by means of a historical and critical survey of four hundred years of European and non-European constitutionalism, with special attention to the American Aboriginal peoples, Tully develops a post-imperial philosophy and practice of constitutionalism. This consists in the conciliation of claims for recognition over time through constitutional dialogues in which citizens reach agreements on appropriate forms of accommodation of their cultural differences, guided by common constitutional conventions.

This form of constitutionalism has the capacity to mediate contemporary conflicts and bring peace to the twenty-first century, and Davis, D. B. (1966). *The problem of slavery in Western culture*. Ithaca, N.Y., Cornell University Press. The comparison between Locke and Pufendorf relies especially on Tuck's illuminating discussion in chap. 5-6.

analyzing. Pufendorf was a lifelong resident of several German states that, in the fragile wake of the treaty of Westphalia, had the most to lose from the aggressive, imperialist and expansionist politics championed by many English and Dutch authors of this period.³⁸¹ In a series of subtle criticisms of Grotius and Hobbes, Pufendorf followed his opponents in modeling the theoretical state of nature on the practices of really existing states, but in contrast to them, he rejected their assertion of the primacy of self-interest and the right to self preservation, and argued for a state of nature characterized by a common, well-regulated moral norms, peaceful interaction and forms of social cooperation for peace and self-improvement. Significantly, he also set out a more fluid and gradated account of sovereignty, focusing on “irregular systems” such as federations, alliances, and mixed imperial forms such as those he was familiar with as a resident of the (then) German states of Saxony and Sweden. In consequence, Pufendorf derived a stronger account of natural sociability, and a correspondingly weaker account of the autonomy of sovereign individuals, than his English opponents. The distinction between the state of nature and civil society was more fluid, entailing more normative constraints on the rights – including the rights to aggressive or punitive war – of individual states. Secondly, Pufendorf developed a “thick” conventionalist account of property that allowed him to recognize territory itself, including uncultivated territory, as a kind of dominion of a sovereign state, thereby undermining the prevailing justifications for colonialism that denied indigenous sovereignty over uncultivated territory. Thirdly, Pufendorf attacked the absolutist theory that one individual (or sovereign) in the state of nature may punish another for perceived violations of natural law. The right to punish was an important theoretical platform for expanding any individual state’s *jus belli* to include virtually whatever the punishing state deemed worthy of ‘punishment.’ Even more importantly,

³⁸¹ Tuck, *Rights of War and Peace*, 142-4.

the individual right to punish violations of natural law was an important justification for colonial enterprises of the English in particular, as Pufendorf somewhat sarcastically observed.

Pufendorf, in other words, presented a non-absolutist alternative account of state sovereignty that stressed moral and legal constraints, cooperation and extended recognition to the sovereignty and dominion of indigenous Asians and Americans. How did Locke respond to Pufendorf's theory? Early in the *Second Treatise*, Locke informs the reader of a principle which, although it "will seem a very strange Doctrine to some Men," is nevertheless undeniably true: the natural right to punish in the state of nature.³⁸² Locke is here reasserting the same natural right to punish that Pufendorf had criticized in Grotius and that had furnished European colonizers with so many opportunities for punishing non-Europeans for their breaches of the law of nations.³⁸³ Pufendorf had argued that punishment logically entails that public prohibitions, with threat of sanctions, are well-known by all subjects before the act was committed. It also entails a relation between a commonly recognized judicial authority and a cognizant subject of that authority; punishment cannot occur between equals, where each is free to interpret unwritten rules as it sees fit.³⁸⁴

In response, Locke asserts two reasons in support of the natural right to punish. First, anyone who breaks the law of nature declares their refusal to live by the rules of "reason and common equity" that serve as a guarantor for the mutual security of mankind as a whole. Therefore, such a declaration amounts to a "trespass against the whole [human] species," and a threat to humanity's collective safety. Confronted by this danger to humanity as a whole, every individual, "by the right he hath to preserve mankind in general," may restrain or destroy such

³⁸² Locke, ¶7

³⁸³ This was part of the general shift, from the 1620s to the 1680s, in which arguments from vacancy or *terra nullius* definitively replaced other justifications such as conversion, conquest, hereditary as the main support for English imperial dispossession of indigenous peoples. See Armitage, 97.

³⁸⁴ *The Law of Nature and Nations*, VIII 3.1; 3.7; 6.5; 6.14. see also Tuck, 158-60.

enemies of humanity, or make examples of them in hopes of deterring other potential miscreants.³⁸⁵ Secondly, if there is not a natural right to punish, Locke asked, then “by what right [can] any prince or state can put to death, or punish an alien, for any crime he commits in their country”? Taking aim at Pufendorf’s criticisms, Locke points out that any legislature has the right to punish a foreigner for breaking the law, without that foreigner ever having willingly entered into any relationship with the established authorities of the foreign country that would establish a duty for obedience, or justify using coercive sanctions in punishing him. In a remarkable substitution, Locke revealingly asserts that

Those who have the Supream Power of making Laws in *England, France or Holland*, are to an *Indian*, but like the rest of the World, Men without Authority: And therefore if by the Law of Nature, every Man hath not a Power to punish Offences against it, as he soberly judges the Case to require, I see not how the Magistrates of any Community, can *punish an Alien* of another Country.³⁸⁶

This natural right to punish, of course, is the power from which is derived that “power in *every* commonwealth, which one may call natural, because it is that which answers to the power every man naturally had before he entered into society” – that is, precisely the terms Locke specifies for the federative power. We can now see why Locke locates this power, which we may call federative or unified external sovereignty, in *every* commonwealth. As the unification of the individual members of the commonwealth, it also represents the *united* power of each member’s natural “executive” right to punish violations of the laws of nature, now concentrated and projected outward in the state of nature between itself and all “other states or persons out of its

³⁸⁵ Para 8

³⁸⁶ 9. See James Tully, “Rediscovering America: the *Two treatises* and Aboriginal Rights,” in *An Approach to Political Philosophy: Locke in Contexts*.

community.” Any perceived infractions by these outsiders, either as individuals or collectively, now “engages the whole in the reparation of it.”

We can now see more clearly what made the federative an absolute, despotic power for those over whom it was exercised. Its business is to direct the united executive powers of the commonwealth, for the twofold purposes of “management of the security and interests of the public” and punitive “reparation” of perceived injuries and violations of the laws of nature. Its two modes of action seem to be reason of state on the one hand, and punitive justice on the other. The reason of state element corresponds to the refocusing and narrowing of the universality of the individual right to punish into the collective interest and security of that commonwealth as a closed political unit vis-à-vis outsiders.³⁸⁷ Whereas *inside* the commonwealth a rational system of general and abstract laws mediates among individuals, and between rulers and ruled, as moral equals, the *external* federative power is *necessarily* discretionary and escapes regulation by general legal norms.³⁸⁸ The difference, Locke explains, is that *internally*,

the laws that concern subjects one amongst another, being to direct their actions, may well enough precede them. But what is to be done in reference to foreigners, depending much upon their actions, and the variation of designs and interests, must be left in great part to the prudence of those, who have this power committed to them, to be managed by the best of their skill, for the advantage of the common-wealth.

That is, the internal circulation of political power among members of the society is expressed through general, abstract laws. But the commonwealth’s power directed outward toward nonmembers cannot be anticipated, much less restrained, by any commonly agreed upon,

³⁸⁷ Ibid., 11; 171

³⁸⁸ *ibid.*, “[the federative power] is much less capable to be directed by antecedent, standing, positive laws, than the executive; and so must necessarily be left to the prudence and wisdom of those, whose hands it is in, to be managed for the public good.”

positive legal norms or regularities. While Pufendorf dismissed the idea of a natural right to punish under such conditions as a craven excuse for imperialism, Locke upheld the unrestrained discretion of the Federative power to identify violators of natural law who have “declared war against all mankind, and therefore may be destroyed as a lion or a tyger, one of those wild savage beasts, with whom men can have no society nor security.”³⁸⁹ The idea defended here by Locke that European powers can and should punish the “wild savage beasts” who practice cannibalism, piracy, human sacrifice or kill settlers had, of course, been a core justification of European atrocities against indigenous Americans since the discovery of the New World.³⁹⁰

In Locke’s terms, the government’s coercive power to punish a foreigner and the Federative power to punish a declared transgressor of natural law in the state of nature are both forms of *despotic* rather than political or paternal power. Whereas paternal power is a form of temporary, benevolent tutelage, and political power arises solely from the rational consent and moral equality of those subject to it, despotic power is an absolute, arbitrary power one man has over another, to take away his life, whenever he pleases.” Despotic power, which can never be the result of a contract, must always be based on the defeated subject’s forfeiture of life itself, as a result of losing a ‘just’ war. Locke describes the person over whom despotic power is exercised as utterly inhuman, an enemy of humanity with whom no coexistence is possible.

for having quitted reason, which God hath given to be the rule betwixt man and man, and the common bond whereby human kind is united into one fellowship and society; and having renounced the way of peace which that teaches, and made use of the force of war, to compass his unjust ends upon another, where he has no right; and so revolting from his own kind to that of beasts, by making force, which is their's, to be his rule of right, he renders himself liable to be destroyed by the injured person, and the rest of mankind, that will join with him in the execution

³⁸⁹ *ibid.*, 11

³⁹⁰ an equivalent argument had already been criticized by Vitoria

of justice, as any other wild beast, or noxious brute, with whom mankind can have neither society nor security*. And thus captives, taken in a just and lawful war, and such only, are subject to a despotical power, which, as it arises not from compact, so neither is it capable of any, but is the state of war continued...³⁹¹

In contrast to the reason of state element, directed by the skill and prudence of the discretionary federative power, Locke's idea of despotic power actually seems to correspond to the "moral" universalist element of the federative, reflecting the originary universality of the natural right to punish in the state of nature.

Despotic power vividly illustrates the gulf that separates the horrific nature of federative power, as the sheer imposition of an absolutely arbitrary, life and death discretion, from the normative ideal of rational consensus and trust that is embodied in political power. It also marks another moment in which Locke seems to explicitly reject a more pacific view held by Pufendorf, and occupy the opposite extreme. Locke was of course financially and administratively involved in the development of the colonial plantation society of Carolina, seemed to have approved of the transatlantic slave-trade on the grounds that it was the legitimate spoils of a just war waged, apparently, by the East Africa trading company. Once again, siding with the absolutist theory and opposing Pufendorf, Locke unflinchingly defends the non-contractual, "Absolute, Arbitrary, Despotical Power" of the master over a slave taken in war. The master, says Locke, has "the power to kill [the slave], at any time," and slavery derives not from any contract but from the fact that the master has the option to delay taking the slave's life, "and may make use of him to his own service" in the meantime. Locke's justification is that the slave, having committed "some act that deserves death," forfeits his right to his own life, and hence the master "does him no injury by it: for, whenever he finds the hardship of his slavery outweigh the

³⁹¹ *ibid.*, 172

value of his life, it is in his power, by resisting the will of his master, to draw on himself the death he desires.”³⁹²

Chapter IV

The Law of Necessity: The Martial Law Paradigm of Emergency Powers

For as in absolute governments the king is law, so in free countries the law *ought* to BE king, and there ought to be no other. But lest any ill use should afterwards arise, let the crown at the conclusion of the ceremony be demolished, and scattered among the people whose right it is.

-- Thomas Paine, 1776³⁹³

³⁹² *ibid.*, 23

Those who established the Union were opposed rather to a strong government *as against themselves* than to a strong government in the abstract; indeed,... they constructed a government with full sovereign power, that is, with absolute and unlimited authority, as against other nations, and with qualified and restricted powers as against themselves, and the object of the restrictive clauses was the protection of those privileges and institutions which were dear to them as inheritors of Anglo-Saxon civilization, and *not the protection of other peoples and nations to whom these privileges and institutions were foreign and perhaps wholly unknown.*

-- George Canfield, 1881³⁹⁴

Enmity, Crime and the Law of War: the “Classical Paradigm” of Emergency Powers

In the previous chapter I argued that modern constitutionalism in the 17th and 18th centuries was able to separate the “exception” from constitutionalized emergency powers on the basis of a dualistic spatial order that emerged in that period. This spatial order entailed an axial distinction between the internal and external juridical domains, and at the same time distinguished the formal equality of sovereign personhood from mere inhabitants of non-European lands open to

³⁹³ Thomas Paine, “Common Sense,” *Thomas Paine: Political Writings*, 28.

³⁹⁴ George Canfield, “The Legal Position of the Indian,” *American Law Review* 15 (1881) 21, 25-6. Quoted in Cleveland, “Powers Inherent in Sovereignty,” 272.

colonial expansion and dominion. This chapter applies that general theoretical framework to the early American republic, focusing on the distinctive forms in which the categories of internal and external sovereignty, exception and constitutionalized emergency powers took shape in the US in the 18th and 19th centuries. The early American republic emphatically inserted itself within the European framework and adopted its essential coordinates. It asserted formally equal rights of sovereign personhood, and claimed to inherit in full the imperial rights of “discovery” and “conquest” in the American colonies before Independence by the Crown. At the same time, it applied modern European constitutionalist framework to a set of unique conditions. First, rejecting the centralizing, modernizing tendencies of the reorganization of the British Empire in the latter half of the 18th century, American Independence reflected a deeply held ideology that linked republican self-rule to regional autonomy and a high degree of decentralization, granting geographically dispersed settler communities the rights to self-government over local affairs. An expansive Federal government was capable of threatening the rights of local self-rule as was the imperial metropole before Independence.³⁹⁵ Hence, even after the adoption of the centralizing Federal Constitution the US nevertheless remained committed to an extraordinary degree of decentralization and regional autonomy, amounting to, as Aristide Zolberg notes, “something other than a “state” in contemporaneous European usage.”³⁹⁶ Secondly, just as the colonial rights to regional self-governance limited imperial control over settlers but did not object to imperial authority over conquered native Americans and other “non-civilized” subjects, the early American republic explicitly claimed full imperial prerogative powers over these subject

³⁹⁵ Greene, J. P. (1986). Peripheries and center : constitutional development in the extended polities of the British Empire and the United States, 1607-1788. Athens, University of Georgia Press.

³⁹⁶ Aristide Zolberg, “International Engagement and American Democracy: A Comparative Perspective,” in Katznelson, I. and M. Shefter (2002). Shaped by war and trade : international influences on American political development. Princeton, N.J., Princeton University Press., 29.

populations.³⁹⁷ Hence, the US inherited a dualistic form of settler ideology that combined republican and imperial forms, sharply distinguishing between the rights enjoyed by members of the republican citizenry, and the subject status of “outside,” governed populations. While the former required an extreme degree of decentralized and limited Federal authority, the latter entailed an unlimited sovereign prerogative, exercised by the Federal government as a whole, directed *outward* against Native Americans, blacks and other colonized subjects.³⁹⁸

This perspective helps emphasize the importance of a set of categories often overlooked or blended together in much of the academic literature on early US emergency powers. In particular, the dualistic structure of insiders and outsiders helps to illuminate two very different sets of criteria governing the internal application of emergency powers within the body politic, and the external imperial prerogative against outsiders that was inherited from the British Crown by the Federal government as a whole. I argue that the central category of *internal* emergency powers in this period was not the Lockean prerogative but martial law. The theory and practice of martial law in this context highlights a distinctively radical application of the constitutionalization of emergency powers discussed in Chapter 2. This radicalization involved uniquely stringent restrictions on emergency powers over citizens, but at the same time it also radicalized the dualistic framework that authorized permanent exceptional authority over subject populations.³⁹⁹

As we shall see, martial law, as a criteria for *internal* emergency powers, is tightened in the American case to exclude any future *threats* to political institutions, no matter how dire.

³⁹⁷ This part of my argument has benefitted above all from Rana, A. (2010). The two faces of American freedom. Cambridge, Mass., Harvard University Press.

³⁹⁸ This formulation is derived from *ibid*.

³⁹⁹ This portion of my argument draws from a number of excellent recent studies of racialized distinctions between citizen and subject in US constitutional development: Cleveland, S. H. (2002). "owers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs." Texas Law Review **81**(1); Saito, N. T. (2007). From Chinese exclusion to Guantánamo Bay : plenary power and the prerogative state. Boulder, Colo., University Press of Colorado., and especially, Aziz Rana, *ibid*.

Instead, emergency powers are justified only when effective political order is actually ruptured – in other words, the criterion is an actual *condition* or political *state*, not an expectation or calculation about the future. On the other hand, imperial categories of ‘discovery’ and ‘conquest’ established subject populations in a kind of permanent, spatially bounded state of exception in which a discretionary, exceptional sovereign power was exercised by the Federal government as a whole entirely outside of constitutional bounds.

Internal and External Sovereignty in America

The starting point here, as in the previous chapter, is the distinction between internal and external sovereignty. Hannah Arendt summarized an important component of a prevailing self-understanding of this period when she proclaimed that the greatest American innovation in politics was “the consistent abolition of sovereignty within the body politic of the republic.”⁴⁰⁰ As Jean Cohen and Andrew Arato point out in a recent article, Arendt cannot be interpreted as asserting that the Americans abolished sovereignty altogether. Rather, *internal* sovereignty, “within the body politic,” was disaggregated and disembodied, whereas *external* sovereignty was preserved in the realm of international affairs.⁴⁰¹

We’ve seen in the previous chapter that despite their very different accounts of the prerogative, both Locke and Blackstone ultimately agree that unified external sovereignty *must* be personified

⁴⁰⁰ Arendt, *On Revolution*, 153. In an 1870 essay, Henry Adams praised the US Constitution as “the most convincing and the most interesting experiment ever made in the laboratory of political science,” Adams explains that “Supreme, irresistible authority must exist somewhere in every government—was the European political belief; and England solved her problem by intrusting it to a representative assembly to be used according to the best judgment of the nation. America, on the other hand, asserted that the principle was not true; that no such supreme power need exist in a government; that in the American government none such should be allowed to exist, because absolute power in any form was inconsistent with freedom, and that the new government should start from the idea that the public liberties depended upon denying uncontrolled authority to the political system in its parts or in its whole.” John Adams, “The Session. 1869-1870,” in John Adams, *Historical Essays* (Charles Scribner’s Sons: New York, 1891), 367-8.

⁴⁰¹ Arato and Cohen, “Banishing the Sovereign?,” 307.

in the executive, and both, using quite different strategies, attempt to restrict personified sovereignty exclusively to the external realm, leaving sovereignty disaggregated and wholly constitutionalized internally. I argued that both Locke and Blackstone struggled to establish the means of bolstering the distinction between internal and external sovereignty, and moreover were only able to maintain the distinction only with the help of the category of dominion. How did the US constitutional founders approach the dilemma of internal and external sovereignty?

Of course, the British assertion of the unified sovereignty of the Parliament over the entire empire as a whole had played a key role in the argument for independence.⁴⁰² The doctrine of unified parliamentary sovereignty undermined the older decentralized imperial constitution that had allowed for settler independence and self-rule. Under parliamentary sovereignty, Anglo-settlers saw themselves transformed from free British settlers into the subjects of the arbitrary sovereign will of the metropole. In a word, governed by the unified, unlimited sovereignty of parliament, colonists were reduced to the status of non-European colonized subjects – Native Americans, Indian Bengalis and even African slaves.⁴⁰³ Thus, among the “injuries and usurpations” cited in the Declaration of Independence, the Crown

has excited domestic insurrections amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.

⁴⁰²Wood, G. S. and Institute of Early American History and Culture (Williamsburg Va.) (1998). *The creation of the American Republic, 1776-1787*. Chapel Hill, Published for the Institute of Early American History and Culture at Williamsburg, Va., by the University of North Carolina Press. T., 344-353.

⁴⁰³ Rana, 80-1.

The colonies, the Declaration continued, are now “Free and Independent States” enjoying “full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do” – in other words, exactly those prerogatives that symbolized the Crown’s personification of unified external sovereignty. Unified sovereignty had reverted to the individual states; the confederation was regarded as a “league of friendship” or “council of nations” with “no real cession of dominion, no surrender or transfer of sovereignty to the national council.”⁴⁰⁴ The wave of state constitution making following independence boldly abolished any expression of unified internal sovereignty – imposing strict separation of powers, frequent elections, and an array of institutional checks on officeholders. Governors in particular were radically weakened, stripped of independence from legislatures and emphatically denied anything reminiscent of the Crown’s claim to embody sovereignty.⁴⁰⁵ Significantly, the classic prerogative powers that were held by the royally appointed governors were expressly transferred to the legislative assemblies, which were regarded not as institutional authorities in their own right but as repositories for the people at large, subject in some cases to recall and even dissolution by the people at large.⁴⁰⁶ In other words, the total abolition of any institutional expression of internal sovereignty went hand in hand with a politics of radically decentralized authority and locally autonomous self-rule. In some cases, this extended to preserving direct communal control over both the means of violence – popular militias – as well as supreme legal authority – extraparliamentary assemblies and conventions – independent of and even in opposition to legally constituted powers.⁴⁰⁷

⁴⁰⁴ Ezra Stiles (1783), quoted in Wood, 355. Article 2 of the Confederation declared that “Each State retains its sovereignty, freedom and independence...”

⁴⁰⁵ especially the prerogative, see virginia, etc.

⁴⁰⁶ Wood, 163-4.

⁴⁰⁷ Extralegal conventions of “the people out of doors” claimed the right to assemble in order to “to consult and debate upon the degree of submission due to constitutional government

Persuaded that the radically decentralized structure of the confederation would lead to disaster, the delegates who gathered in Philadelphia in 1787 sought to create a federal structure possessing unified external sovereignty, while at the same time avoiding any institutional personification of sovereignty – internally *or* externally.

The distinctiveness of this effort becomes clear if we compare the marks of external sovereignty in the 1787 Constitution with the accounts from Locke and Blackstone discussed in the previous chapter. As we saw, Locke’s Federative power entailed “the power of war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth.” Blackstone included in the royal prerogative the power to make “war or peace,” to send and receive ambassadors, to make “a treaty with a foreign state, which shall irrevocably bind the nation”; to issue letters of marque and reprisal, was “generalissimo, or first in military command,” enjoying “the sole power of raising and regulating fleets and armies.” For both Locke and Blackstone equally, these powers were exclusive to the executive, absolute, and unlimited within their sphere, e.g. external sovereignty.

The 1787 constitution adopts Blackstone’s marks of external sovereignty nearly verbatim, but rather than unifying them in the person of the executive, the attributes of external sovereign personhood are disaggregated and distributed among the branches. The separation of powers, and checks and balances, are made to apply not only to internal but to external sovereignty as well. Thus, the powers to declare war, raise armies and navies, and issue letters of marque and reprisal are held exclusively by Congress. Treaty making and appointment powers are shared between the president and the Senate. Of these, perhaps the most fundamental of these marks of sovereignty, the rights over declaring war and peace, were emphatically placed in the exclusive hands of Congress. Jefferson noted approvingly that “We have already given in

example one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay.”⁴⁰⁸ The contrast with Blackstone, and even Locke – for whom the “power of war and peace” is lodged in the federative, which, unlike the executive, cannot be subjected to the rule of law and is necessary a purely discretionary power – is striking. Despite their alarm over “democratic tendencies” and their determination to construct unified external sovereignty, the framers placed the most basic of sovereign powers, the decision over war and peace, as an exclusive power of the legislature rather than the executive.

Whereas the argument that external sovereignty itself has been disaggregated was made repeatedly in defending the president against charges of monarchism, the *Federalist* seems to assume that legislative and executive powers together can constitute unified external sovereign personhood. This point is made most clearly in papers 23, 41 and 42 –which have mistakenly been interpreted as referring to the president alone, whereas they clearly refer to external powers of the union as a whole. 23 makes clear that the *external* powers of the “union” amount to nothing less than unified sovereignty:

These powers [essential to the common defense] ought to exist without limitation, BECAUSE IT IS IMPOSSIBLE TO FORESEE OR DEFINE THE EXTENT AND VARIETY OF NATIONAL EXIGENCIES, OR THE CORRESPONDENT EXTENT AND VARIETY OF THE MEANS WHICH MAY BE NECESSARY TO SATISFY THEM. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances; and ought to be under the direction of the same

⁴⁰⁸ Jefferson, quoted in Louis Fisher, “Lost Constitutional Moorings: Recovering the War Power,” *Indiana Law Journal* 81 (2006), 1202.

councils which are appointed to preside over the common defense.

Moreover, Hamilton draws from the earlier argument that statehood must be redefined from the sovereignty of the collective body of the citizenry to the monopoly of the means of violence⁴⁰⁹ in order to argue for the logical necessity of unified external sovereignty

the moment it [i.e. the necessity of a federal state holding the legitimate means of violence] is decided in the affirmative, it will follow, that that government ought to be clothed with all the powers requisite to complete execution of its trust. And unless it can be shown that the circumstances which may affect the public safety are reducible within certain determinate limits; unless the contrary of this position can be fairly and rationally disputed, it must be admitted, as a necessary consequence, that there can be no limitation of that authority which is to provide for the defense and protection of the community, in any matter essential to its efficacy that is, in any matter essential to the FORMATION, DIRECTION, or SUPPORT of the NATIONAL FORCES.

The sovereignty of the collective body of the citizenry *necessarily presupposes* the external sovereignty of the state as the monopoly of the means of legitimate violence. Having deduced the necessity of unified state sovereignty, the paper ends by arguing that the anti-Federalists are utterly confused in attacking this; the real question requiring “the most vigilant and careful attention” is not the existence of state sovereignty but ensuring “that it be modeled in such a manner as to admit of its being safely vested with the requisite powers.” Madison makes a very similar argument for *externally* unbounded sovereignty in no. 41, while strenuously arguing that internally the federal authority will neither be unified nor unlimited, but strictly

⁴⁰⁹ The same paper makes an even clearer association of the “federal government” with Weber’s famous definition of the state: “The result from all this [i.e. the demonstration of the inability of the confederation to maintain republicanism] is that the Union ought to be invested with full power to levy troops; to build and equip fleets; and to raise the revenues which will be required for the formation and support of an army and navy, in the customary and ordinary modes practiced in other governments.

circumscribed to matters *between* the states. And as nos. 25 and 26 argue, *some* standing army is required in order to minimally qualify as an adequate state, but the solution here too is to follow, and improve upon, on the British model. Congress as a whole – with the full inclusion of the most democratic branch – will be responsible for providing for the standing Army. Moreover, state militias will be maintained and authority over them will be shared by the federal and state governments. Hence the faces of internal and external statehood were sharply distinguished and by fragmenting the control over military authority.

As Rana summarizes, Madisonian republicanism “tied an energetic federal government to the external project of empire building, a project that presupposed an unlimited imperial power deriving from British royal prerogative. Aggressive federal activity thus became synonymous with the internal application of a coercive authority properly applied only to those outside the bounds of social inclusion, such as natives and blacks. Under these circumstances, any internal appearance of the dreaded imperial prerogative was viewed as a dangerous threat to liberty and an attempt to reduce free settlers to the condition of heathens or savages – by treating free citizens as if they were colonial subjects.

The words “people of the United States” and “citizens” are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the “sovereign people,” and every citizen is one of this people and a constituent member of this sovereignty. The question before us is, whether the class of persons described in the plea in abatement compose a portion of this

people, and are constituent members of this sovereignty? We think they are not...⁴¹⁰

We can focus our inquiry into the categories of emergency powers and the state of exception, then, by asking: to whom and under what conditions can the protections guaranteed to all “persons” under the Due Process and Equal Protection Clauses be suspended or denied? The distinction between emergency powers and the state of exception indicates two broad domains of this question. The state of exception refers to those entirely outside the political body referred to by Taney, and hence subject to the *extra*-constitutional, fully discretionary power of external sovereignty. Emergency powers, on the other hand, pertains to circumstances in which the rights accorded to full citizens, or non-citizen “persons” recognized by the Constitution, can be *constitutionally* suspended or altered while remaining without the limits of enumerated power.

The War Paradigm

The paradigm of war could constitute a state of exception, in which due process rights of citizens and persons could be replaced entirely by the customary laws of war between enemy belligerents. While this possibility was widely acknowledged throughout the antebellum period, the clearest examples of its application occurred during the Civil War. *The Prize Cases* (1862), for example, concerned a number of privately owned vessels seized by the Union from Southern ports as prize under the laws of war. The owners of the vessels did not dispute the legitimacy of prize and booty under the laws of war. They argued, however, that the insurrection at the time was a limited “emergency” but did not qualify as a full scale state of exception between

⁴¹⁰ *Scott v. Sandford*, 393, 404.

sovereign belligerents. The president was authorized to use limited and temporary emergency powers against specified leaders of the secession, but all other citizens and persons remained presumptively loyal and in full enjoyment of their constitutional rights. “Insurrection is the act of individuals and not of a government or sovereignty,” and therefore remains fully within the “crime” paradigm. Limited emergency powers do not abridge the strict division between internal and external sovereignty; “the Constitution and Laws of the United States are still operative over persons in all the States for punishment as well as protection.”⁴¹¹

Justice Grier, writing for the majority, rejected this argument, asserting that the rebellion was no mere insurrection but a civil war. “When the regular course of justice is interrupted by revolution, rebellion, or insurrection, so that the Courts of Justice cannot be kept open.” In this condition, “civil war exists and hostilities may be prosecuted on the same footing as if those opposing the Government were foreign enemies invading the land.”⁴¹² War does not require that both belligerents recognize one another’s sovereignty. What is decisive is that both parties claim rights as independent sovereigns, and since they “consider each other as enemies and acknowledge no common judge,” the belligerents necessarily rupture the internal juridical space of the constitution. War is defined as a state of exception in which “a nation prosecutes its right by force,” enjoying the *jus belli* sovereign right of prize and capture undiminished by internal constitutional constraints.⁴¹³

The Prize Cases clearly articulates the theoretical framework that serves as a basis of the “classical paradigm” of emergency powers. First, it establishes the fundamental distinction between war and peace. War is a condition between two public enemies who prosecute their rights by force. Both parties claim sovereignty (even if they do not each recognize the other’s

⁴¹¹ *The Prize Cases* (1862), 642-3

⁴¹² *Ibid.*, 26

⁴¹³ *Ibid.*, 25

claim) and recognize no “common superior judge between them.” Warfare is not a lawless void but is governed by the non-statutory laws of war, consisting of the customary law of *jus belli*, and the natural law of self-preservation. Because there is no common law, the belligerents claim their natural rights to execute the law of war – and therefore natural law – themselves.

Belligerents are *not* criminals but public enemies subject to the laws and customs of war. Non-combatants residing on enemy territory may not be deliberately killed,⁴¹⁴ but they do not enjoy the same status as the state’s own citizens. Their property may be seized as a prize of war among other hardships, and they may even be incidentally killed. They are exposed to these hardships, not because they committed any crime or violated any law, but because they are members of an enemy collectivity. *War implies a logic of collective responsibility.*

In contrast, peace is the condition of effective internal sovereignty, which exists when the regular course of justice is not interrupted, and courts are able to function normally. When internal sovereignty is not interrupted by invasion, Constitutional rights and limitations are fully in effect, and cannot be altered or suspended because of any exigency or interest of the state, no matter how urgent. The state may use its coercive power over individuals only in response to a *crime*, for which individual guilt must be proven according to the procedures regulating a criminal trial. *If war implicates a logic of collective responsibility, crime presupposes the principle that guilt is individual.*

Finally, these two conditions are distinguished by very distinct ends. The end of warfare was the imposition of right by force, through the military defeat of the enemy. Hence holding prisoners of war is recognized as a legitimate measure by the laws and usages of war because it serves the end of military victory. Detaining the enemy’s soldiers is solely for the sake of

⁴¹⁴ This principle, long recognized in *jus belli*, was legally codified in the Leiber Code during the Civil War

preventing them from returning to the battlefield, thus prisoners of war are held in preventative detention. They have not, however, committed any crime in fighting. Thus, according to the laws and usages of war, they cannot be tried, punished, interrogated, mistreated, etc. The end of the criminal paradigm – especially before the influence of utilitarian theories of crime – is the determination of individual guilt or innocence through the legally constituted procedures of a trial, and the re-instantiation of the rule of law through legally constituted punishment. All of this, of course, is incoherent without the jurisdiction of a neutral judge maintained by effective internal sovereignty.

Sovereign Conquest and Imperial Subjects

The contrast between the crime and war paradigms, therefore, presents a dualistic framework in which two distinct legal frameworks – the internal juridical space governed by the constitution, and the external space between sovereigns, governed by the law of nations and laws of war – each occupy their own exclusive sphere. This structure, of course, was a direct application of the fundamental principles of the *jus publicum europaeum* analyzed in the previous chapter. A *second* domain of unified external sovereignty, derived in large part from the same body of early modern natural rights theory, played perhaps an even more important role in constitutional theory of the early republic: the unlimited discretionary powers expressed in the sovereign rights of discovery, conquest and dominion. We saw in the previous chapter how the *jus publicum europaeum* was able to balance internal rule of law and external formal sovereign equality among European powers only by maintaining an exceptional space *outside* Europe of unrestricted territorial conquest and dominion. A similar structure – distinguishing between internal enumerated powers and external sovereign prerogative, between the rights accorded to

autonomous citizens and the discretionary governance of dependent subjects – was a core feature of antebellum American constitutional development and political thought.⁴¹⁵ The mutual recognition of the laws of war (at least in theory) and formal sovereign equality among “civilized” powers confined war between states within an established, customary legal order. The sovereign control over occupied territories and indigenous subjects was, on the other hand, a more radically discretionary space, outside the dualistic orders of both crime and war. In a rapidly expanding republic, with an increasing number of non-citizen subjects as well as self-governing settlers on its territories, the spatial differentiation of republican norm and imperial “state of exception” increasingly helped to define the constitutional trajectory of the republic.

One of the core issues around which this exceptional zone developed was the status of Native Americans. Two of the primary categories for theorizing this question were peculiarly Orwellian doctrines of “discovery” and “vacant territory” derived from early modern theories of the laws of nations. The doctrine of discovery, as Chief Justice Marshall wrote in a 1823 opinion, granted “to the nation making the discovery the sole right of acquiring the soil from the natives and establishing settlements upon it.”⁴¹⁶ As we saw in the previous chapter, this doctrine prevented conflict among European powers over territorial claims outside of Europe, thereby mediating between formal sovereign equality of the inter-European order and the unlimited “vacant” spaces of the New World. I argued that such mediating categories helped contain the exceptional space of unlimited land appropriation to the New World, and prevented it from infiltrating the legally bounded interstate order within Europe itself – the *jus publicum europaeum*.⁴¹⁷

⁴¹⁵ Rana, *Two Faces of American Freedom*

⁴¹⁶ *Johnson v. M’Intosh*, 573.

⁴¹⁷ Carl Schmitt, *Nomos*, chapter 3.

Reviewing this history, Marshall notes that the claim of “discovery” meant that the “complete sovereignty” of the original indigenous inhabitants was “necessarily diminished” by the European discovering power’s exclusive rights over land acquisition. In addition to excluding relations with all other European powers, this “diminished” sovereignty meant that the degree of independence or autonomy granted to the Indian tribes was not fixed by the law of nations but was determined at the discretion of the discovering power. The British Crown, for instance, was free to treat Indians as independent sovereigns and purchase land from them by treaty, or it could deny their sovereignty altogether, acquire their land by conquest, govern them as a British subjects, or as a separate colonized population, or even eliminate their population from settled territory.⁴¹⁸ This unlimited discretionary power involved the right to declare an exception to the laws of nations governing conquest. Marshall notes that the customs of civilization and the law of nations prescribe that conquered populations should be absorbed within the population of the victorious nation and accorded the same rights and status as the population as a whole. In America, however, the Crown’s determination that “tribes of Indians inhabiting this country were fierce savages” without property or industry made them “a people with whom it was impossible to mix,”⁴¹⁹ and therefore suspended the law of conquest, creating an exceptional status for Indians as “in some respects as a dependent and in some respects as a distinct people occupying a country claimed by Great Britain...”⁴²⁰

According to the organization of external sovereign personhood in the British Constitution, absolute title over all such “vacant lands” (meaning lands occupied by Indians) is “vested in the Crown, as representing the nation, and the exclusive power to grant them is

⁴¹⁸ Johnson v. M’Intosh, 590.

⁴¹⁹ Ibid., 590

⁴²⁰ *ibid.*, 596.

admitted to reside in the Crown as a branch of the royal prerogative.”⁴²¹ With the Treaty of Paris, this absolute prerogative power over territories passed from the Crown to the independent United States as a whole. Thus,

The United States, then, has unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold and assert in themselves the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy either by purchase or by conquest, and gave also a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise.”⁴²²

Thus, while internally the old imperial prerogative was formally abolished and all federal power was strictly limited to what was enumerated in the constitutional text, the unlimited imperial prerogative possessed by the Crown passed directly and undiminished to the unified powers of the federal government over non-citizens and territories. Moreover, the ideology of decentralized, agrarian republicanism not only required that these two faces of sovereignty be kept absolutely distinct; it also coupled them together by linking republican self-government to territorial expansion, conquest and continual imperial rule over subject populations.⁴²³ Of the members of the founding generation, this contradictory structure of republic and empire was embodied perhaps most clearly by the mercurial political imagination of Thomas Jefferson. In a letter to James Madison, speculating on the prospects of annexing Florida, Cuba, Mexico and Canada, Jefferson declares that “we should have such an empire for liberty as she has never

⁴²¹ Ibid., 595. Marshall adds that, “[s]o far as respected the authority of the Crown, no distinction was taken between vacant lands and lands occupied by the Indians,” 596.

⁴²² Ibid., 587

⁴²³ Rana, 105-120; Onuf, P. S. (2000). *Jefferson's empire : the language of American nationhood*. Charlottesville, University Press of Virginia.

surveyed since the creation; and I am persuaded no constitution was ever before so well calculated as ours for extensive empire and self-government.”⁴²⁴

Between Crime and War: Martial Law and the Suspension of Habeas Corpus

These categorical distinctions, of course, are neither anthropologically universal nor timeless logical postulates. They are principles that arose from the historical formation of the modern state and the development of constitutionalism. The distinction also clarifies the general problematic addressed in this chapter: what happens in circumstances when the internal conditions of sovereignty are disrupted, but fall short of an actual invasion triggering a state of war? How does the peace/war distinction deal with boundary cases in which internal sovereignty is temporarily impeded, without constituting a state of war? The most important category for addressing this question in the early American republic is not extralegal actions but martial law. Thomas Jefferson, in reference conspiracy to separate territories in the Southwest of the United States, expressed his alarm and frustration that the conspirators were able to manipulate civil laws to avoid prosecution. “I did wish to see these people get what they deserved;” Jefferson wrote,

and under the maxim of the law itself, that *inter arma silent leges*, that in an encampment expecting daily attack from a powerful enemy, self-preservation is paramount to all law, I expected that instead of invoking the forms of the law to cover traitors, all good citizens would have concurred in securing them... There are extreme cases where the laws become inadequate even to their own preservation, and where the universal resource is a dictator, or martial law.⁴²⁵

⁴²⁴ Jefferson to Madison, April 27 1809 in *The Writings of Thomas Jefferson* volumes 11-12, 277.

⁴²⁵ Jefferson, Letter to Doctor James Brown, October 27, 1808. Available online at <http://www.gutenberg.org/files/16784/16784-h/16784-h.htm>

Jefferson neatly summarizes the criteria for martial law, or the substitution of the will of the commander for the supremacy of laws. This can be justified only in a condition of extreme, existential danger, in which basic political order has been disrupted and where obeying ordinary legal restrictions would make self-preservation impossible.⁴²⁶

Jefferson here is reflecting a fairly longstanding common law theory of defining martial law as a boundary category located at a precise division between the paradigms of crime and war. According to this theoretical tradition, martial law always referred – since the early Stuarts – to the category of war and an abeyance of ordinary legislative authority.⁴²⁷ Employed by the absolutist interpretation of royal prerogative, it was listed in the petition of right as one of the abuses of the Crown. After 1689 and the triumph of parliamentary sovereignty, martial law was confined exclusively to the realm of war and military law. Sir Matthew Hale declared in 1713 that “in Truth and Reality it is not a Law, but something indulged rather than allowed as Law;” and confined it strictly to “Members of the Army, or those of the opposite Army, and never was so much indulged as intended to be (executed or) exercised upon others.”⁴²⁸ Indicating the principle of effective internal sovereignty we referred to earlier, Hale makes the contrast between martial law and the crime paradigm explicit: “the Exercise of Martial Law, whereby any Person should lose his Life or Member, or Liberty, may not be permitted in Time of Peace, when the King’s Courts are open for all Persons to receive Justice, according to the Laws of the Land.”⁴²⁹

Martial law, therefore, reflects the theoretical model we have described, resting on the categorical dualisms of war and peace, crime and public enmity. In war, martial law was the

⁴²⁶ The actual events surrounding the conspiracy, and even some of Jefferson’s other interpretations of this principle, are considerably more complicated and ambiguous. See Schlesinger, *The Imperial Presidency*

⁴²⁷ J.V. Capua, “Early History of Martial Law in England from the Fourteenth Century to the Petition of Right,” *Cambridge Law Journal* 36 (1977); Charles Fairman, *The Law of martial Rule* (1930); Carl Schmitt, *La Dictature*, 172-9.

⁴²⁸ Hale, quoted in J.H.A., “Martial Law,” *The American Law Register* 9, no. 8 (1861): 498-9.

⁴²⁹ *Ibid.*

valid law of belligerents on both sides. Martial law was not, however, tied to an actually existing state of war but could be employed in any circumstance where ordinary courts could not function, i.e. where effective internal sovereignty has been temporarily disrupted. Martial law in this sense definitionally maps onto the theory of emergency powers I have proposed as the “classic paradigm” – a condition of temporary disruption or abeyance of the conditions of political order that make constitutional rights possible. There is an important distinction between the criteria of martial law model which characterized the classical paradigm, and even the most extreme terms like “self-preservation,” “dire threat,” “strict necessity,” etc. The latter, no matter how frightening and urgent, characterize *probabilistic judgments* about some anticipated condition. Martial law, on the other hand, represents an especially restrictive criteria for emergency powers because it refers to an actual *state* or *condition* rather than some calculation about what *might* occur in the future. Although there is some amount of variation in historical sources, the most consistent criterion for the validity of martial law until the late 19th century was the *actual condition* of disrupted internal sovereignty, measured by the physical ability of courts to open their doors and perform their business.⁴³⁰ Hence even Jefferson, in the letter quoted above, refers to ongoing conditions of political disorder in New Orleans, and the inability of ordinary criminal law to apprehend the treasonous individuals.⁴³¹

The fact that martial law referred to an actual condition rather than a future probable outcome was also the source of its theoretical coherence. Its jurisdiction categorically excluded civilians, and extended to “persons” only in the paradigmatic case where internal sovereignty has

⁴³⁰ Hence, despite the ongoing Burr conspiracy, Jefferson refused to declare martial law in New Orleans in 1806 on the grounds that it could be justified only by circumstances themselves, rather than by a positive declaration. Dennison, G. (1974). “Martial Law: The Development of a Theory of Emergency Powers.” *American Journal of Legal History* 18, 57 and, McCaleb, W. F. (1903). *The Aaron Burr conspiracy : a history largely from original and hitherto unused sources*. New York, Dodd, Mead., 201-242.

⁴³¹ Jefferson’s justification is weakened considerably by the fact that Burr and his co-conspirators were in fact apprehended in Ohio, and never even made it to New Orleans. Nevertheless, Jefferson writes, we acted on the information available to us, that members of the conspiracy had made it to New Orleans. See *ibid*.

been disrupted and ordinary courts cannot function. In other words, citizens in the sense of actually enjoying their constitutional rights were *definitionally* excluded from martial law, since if they have no access to courts, their positive status as rights bearing citizens of a particular sovereign state is in abeyance. For the same reason, although they are technically distinct, martial law is theoretically consistent with the suspension of habeas corpus. Habeas corpus is paradigmatic of the rights enjoyed by citizens when charged with a crime. The condition for suspending these rights is identical to the condition for the extending the jurisdiction of martial law: when courts cannot open and function, when internal sovereignty has been disrupted.

The historical precedents of martial law in the early American republic seem to confirm these strict limitations. During its first three decades, the US federal government dispatched troops to restore internal political order on six occasions; in all of these except one the paradigm of martial law was deliberately avoided: troops were under the exclusive orders of civil officials, and did no more than enforce ordinary laws.⁴³² The Burr conspiracy was the single exception in this period, and its reception effectively confirmed the rule of scrupulously avoiding martial law in any but the most immediate necessity. General Wilkinson, who was dispatched to New Orleans to impose order, attempted repeatedly to persuade Jefferson and the Louisiana Governor to suspend habeas corpus and declare martial law. Both declined, arguing in the first case that only the legislature has that power, and in the second case that only the physical condition of a breakdown of political order, and not a mere decision of the executive, can authorize martial law.⁴³³ In the aftermath, Jefferson pressured Congress to pass new legislation criminalizing conspiracies similar to Burr's. A lengthy Congressional debate over the legislation evinced a deep commitment toward maintaining the strictest possible restrictions over martial law.

⁴³² Dennison, 56.

⁴³³ Ibid.

Articulating a widely shared view, one representative declared that “Society will never submit life to the discretion of a military court, except under the most absolute and imperious necessity, in which a civil court cannot interfere, particularly during war.”⁴³⁴ This restrictive theory of martial law was confirmed again in cases stemming from the war of 1812.

In 1814, citing the presence of the British Navy surrounding New Orleans, General Andrew Jackson placed the area under martial law. The initial declaration remained unchallenged: the physical presence within the territory of enemy forces with the intent and capacity for conquest is a paradigm case of the martial law theory. After the British Navy withdrew, however, Jackson maintained martial law over New Orleans for another four months, withdrawing it only when he received definitive news of the Treaty of Ghent.⁴³⁵ In the period *after* the attacking forces withdrew, Jackson’s decision was widely criticized and condemned, earning him a conviction of contempt of court and a \$1000 fine at the hands of a Federal District Judge whose habeas corpus writ Jackson had earlier ignored.⁴³⁶ The basis of the contempt conviction, of course, was the strict criteria of martial law itself, which is valid “law” only in conditions where constituted judicial authority has broken down.

Martial Law and the Outside of the Body Politic

These rigid restrictions on martial law were carefully observed for the free British subjects in the American colonies. However – consistently with this definition – martial law was often employed over colonized populations that were excluded from this status; in Ireland, the

⁴³⁴ quoted in Dennison, *ibid.*

⁴³⁵ *ibid.*, 61.

⁴³⁶ McCalbe, *Aron Burr*.

Caribbean and other British colonies.⁴³⁷ Likewise, after independence, the early republic scrupulously maintained the absolute prohibition on the jurisdiction of martial law within the body politic when courts have opened their doors. Remarkably, martial law was never put into effect internally during the six separate rebellions that occurred in the first three decades after independence. During these rebellions, civilian courts continued to function in their midst, and the state militias were led by civilian authorities, and applied ordinary criminal law.⁴³⁸

However, as in the British case, these careful restrictions gave way in relation to those who were both non-citizens and outside the European spatial order governed by the non-statutory laws and customs of war. Some legal historians have identified the “old tradition of swift and discretionary justice” of martial law as the key foundation for the development of American slave law.⁴³⁹ While carefully avoided in the recognized states, martial law was more often declared in territories such as New Orleans and Florida. Moreover, the common-law natural right to self-defense was an accepted basis for violence against native Americans on the frontiers.⁴⁴⁰ Here the issue was not the functioning of courts but the lack of a common authority between citizens and “savages.” In the Seminole War, Gen. Jackson was admonished for accusing two British subjects as spies and punishing them under martial law. The problem, according to the congressional report, was that he treated the British men as if they were Indians. According to

⁴³⁷ Here Hannah Arendt’s distinction in the *Origins of Totalitarianism* between imperialism and colonialism is apposite. On the use of martial law in British Imperialism, see, Hussain, N. (2003). *The jurisprudence of emergency : colonialism and the rule of law*. Ann Arbor, University of Michigan Press.; Charles Townsend, “Martial Law: Legal and Administrative Problems of Civil Emergency in Britain and the Empire, 1800-1940” *The Historical Journal* 25, no. 1 (1982); G. G. Phillimore, “Martial Law in Rebellion,” *Journal of the Society of Comparative Legislation* 2, no. 1 (1900).

⁴³⁸ George Dennison, “Martial Law,” 56-7. The partial and somewhat ambiguous exception was during the Burr conspiracy. Jefferson refused to suspend habeas corpus, and martial law was never put in place, but he did appear to instruct Gen. Wilkinson to summarily arrest the conspirators and send them to Washington D.C. for trial.

⁴³⁹ David Konig, “Dale’s Laws and the non-Common Law Origins of Criminal Justice in Virginia” *The American Journal of Legal History* vol. 26 (1982), 354; Christopher Tomlins, “Law’s wilderness: The discourse of English colonizing, the violence of intrusion, and the failures of American history,” in *New World Orders* ed. Smolenski and Humphrey (Philadelphia: University of Pennsylvania Press). See also Thomas Morris, *Southern Slavery and the Law, 1619-1860*, 38.

⁴⁴⁰ Dennison, “Martial Law.”

the report, the law of nations recognizes that “where the war is with a savage nation, which observes no rules, and never gives quarter, we may punish them in the persons of any of their people whom we may take, (these belonging to the number of the guilty,) and endeavor, by this rigorous proceeding, to force them to respect the laws of humanity; but wherever severity is not absolutely necessary, clemency becomes a duty.”⁴⁴¹ Hence, the scrupulous limitations on martial law internally are entirely consistent with its jurisdiction externally. Martial law was employed with both European belligerents, who were treated according to the laws and customs of war, and “savages” – and, in the South, rebellious slaves – which constituted exceptions to *jus belli*.⁴⁴² The distinctions between citizens, European or white public enemies and “savages” was once again emphasized during the civil war. Both the laws and customs of war and statutory codes required that captured Confederate soldiers be treated not as criminals but as prisoners of war; they could not be tried for any crime but could only be detained for the duration of the war. In the same period, Sioux Indians fought against settlers in Minnesota, although no war was formally declared and thus, no distinctions between combatants and non-combatants were observed. After the settlers’ victory, the Sioux remaining in custody were tried and sentenced to death en masse.⁴⁴³

Hence, the jurisdictional boundaries of martial law were constituted not only by the condition of internal sovereignty but also by the boundaries of membership in the body politic. The rigidity of these distinctions resulted in the strictly limited and exceptional status of emergency powers that Jules Lobel and others contrast favorably with subsequent developments.

⁴⁴¹ House Committee on Military Affairs Special Report, quoted in Fisher, *Military Tribunals*, 29.

⁴⁴² In this sense, one might argue that the “classical paradigm” corresponded to what Carl Schmitt describes as the “limiting and bracketing of war” in the *jus publicum Europaeum*, within which recognized powers were regarded as *jus hostes*. Non-Europeans were outside this “spatial order,” were not accorded the status of *personae morales* and could be annihilated or subjugated. Schmitt, *Nomos of the Earth*, 141-2.

⁴⁴³ Most of the convictions were later commuted by Lincoln. See, Carol Chomsky, “The United States-Dakota War Trials: A Study in Military Injustice,” *Stanford Law Review* 43 (1990).

This is certainly much truth to this contrast, but at the same time we must keep in mind the fact that this exclusive doctrine was held by a slaveholding and expansionist republic that exercised power over territory and inhabitants that were excluded entirely from the body politic. “Savages” and slaves were visible to the law only through the natural rights of necessity, and were under the permanent jurisdiction of martial law. The comparatively unique strictness of emergency powers in the early American republic was accompanied by an equally radical distinction between citizens who enjoyed their full constitutional rights under conditions that would elsewhere count as states of emergency, and non-citizens slaves and native groups who found themselves subject to something akin to a permanent state of exception.⁴⁴⁴ If anything, one might say that from the perspective of non-European non-citizens, this brief period resembles the radical condition of anormativity at the heart of the liberal system of legal norms famously described by Giorgio Agamben.⁴⁴⁵ However, while Agamben abstracts and universalizes this historically specific condition, I shall argue that pressures for democratic inclusion undermined the rigid distinctions of this constitutional model of emergency powers itself, giving way to a new, more inclusive, if ambivalent, order. In the next section, I will examine two important instances where these demands for inclusion raised a set of penumbral questions for which the martial law paradigm had no answer, and forced the development of a new, unarticulated distinction within the classical paradigm: the distinction between what I will call “sovereign” and “commissarial” forms of martial law.

Martial Law and the Problem of Inclusion

⁴⁴⁴ cf Edward Moglin, *American Slavery/American Freedom*; Daniel Kato, *Constitutional Anarchy* (PhD Dissertation, New School for Social Research); Francis Jennings, *The Invasion of America* (1975); George M. Fredrickson, *White Supremacy: A Comparative Study in American and South African History* (1981).

⁴⁴⁵ Giorgio Agamben, *Homo Sacer; State of Exception*

Commissarial Martial Law and the Constituent Power

The difficulty distinguishing between the powers exercising sovereign and commissarial dictatorship in different contexts. These cases do not arise from a straightforward constitutional rupture (as in, say, France in 1791) but from attempts at inclusion in the body politic of previously constitutionally excluded groups. As we shall see in this case, and even more dramatically in the next section, these episodes raised penumbral difficulties in the classical paradigm because the constitutionality of emergency powers hinged on the terms of membership in the body politic itself. While neither of these experiences were sufficient to overthrow the classical paradigm textually, in practice it became increasingly infused with contestation and anomaly, undermining its claim to impose immediate and incontestable criteria on the use of emergency powers.

The relationship between the classical paradigm of emergency powers and those excluded from the body politic would reemerge in 1842, during the first declaration of martial law in the incorporated states. This instance is especially notable because martial law for the first time was given jurisdiction over white male citizens who were excluded from political rights, but not civil rights, during the Dorr rebellion.⁴⁴⁶

Carl Schmitt's distinction between commissarial and sovereign dictatorship.⁴⁴⁷ For Schmitt, both types of dictatorship properly speaking refer to the temporary emergency powers exercised by commission; dictatorship is always a *delegated* rather than a sovereign power. Sovereign dictatorship is commissioned by the *constituent* power for the purposes of creating a new constitutional order. It is associated with the emergency powers exercised during the

⁴⁴⁶ For a helpful overview of the tensions resulting from demands for democratic inclusion and expansion in this period, see Alexander Keyssar, *The Right to Vote: the Contested History of Democracy in the United States*. For a discussion of the Dorr rebellion in particular, see pps. 71-6 in the same volume.

⁴⁴⁷ Schmitt, *La Dictature*, 196-8. The term commissarial dictator, as far as I can tell, is not Schmitt's own innovation but was used to describe General Cavaignac during the state of siege imposed in Paris in June, 1848.

revolutionary creation of a new constitution.⁴⁴⁸ I shall discuss this in depth when we turn to the Civil War. Commissarial dictatorship, the model relevant here, is a commission from the *constituted* power for the purposes of restoring the old constitutional order.⁴⁴⁹ In contrast to sovereign dictatorship, commissarial dictatorship is a *conservative* function, commissioned by the already existing but imperiled institutions, meant to overcome the emergency and restore the *status quo ante*.

I shall leave aside the specifics of dictatorship – which largely belong to another, continental tradition – and refer to commissarial and sovereign emergency powers to distinguish between two types of commissions. The concept of commissarial emergency powers is apposite for the Dorr rebellion, in which martial law was justified as a commissarial emergency measure commissioned by the constituted power to restore effective internal sovereignty that had been disrupted by a new constituent power. What is distinctive about this case – aside from being the first judicial treatment of the problem of martial law⁴⁵⁰ – is that it highlights the emergence of this distinction for the first time *as a problem*. For all the safeguards of the classical paradigm, this instance demonstrates that it lacked criteria for distinguishing in a non-question begging manner between the *status quo* and the emergency.

1842, Rhode Island was an aristocratic anomaly in the rapidly democratizing United States. The colonial charter of 1663 was still in effect, reserving power to an old landed and mercantile elite from the colonial era. The charter's property restrictions disenfranchised well over half the adult male population, and severely malapportioned representation in favor of the older rural centers of power at the expense of the manufacturing centers where workers and Irish

⁴⁴⁸ *ibid.* 143-151.

⁴⁴⁹ *Ibid.* 23-30

⁴⁵⁰ Jason Collins Weida, "A Republic of Emergencies: Martial Law in American Jurisprudence," *Connecticut Law Review* 36 (2004).

immigrants were concentrated.⁴⁵¹ Lagging behind the expansion of white male suffrage in every other state, the charter's critics declared sarcastically that "all men are created equal, except in Rhode Island."⁴⁵² Convinced that their exclusion by the existing charter would be permanent, the working class-based Rhode Island Suffrage Association announced that they were bypassing the charter's authority altogether and convening a People's Convention to draft a new constitution, in the name of the people's constituent power. "If the sovereignty don't reside in the people," asked one member, "where in the hell does it reside?" The Convention produced a "People's Constitution," enshrining universal male suffrage, reapportioned the legislature. In an attempt to head off the crisis, the legislature called its own convention, which produced a "Freemen's" constitution that incrementally expanded suffrage while leaving the state's colonial power structure largely intact. The People's Constitution won out overwhelmingly in popular ratification, while the charter's more limited proposal was voted down.

It is important to add that there was by this time nothing unusual about this assertion of the popular constituent power over the authority of state charters. The Rhode Island reformers were following a tradition since Independence of states that reformed their constitutions and expanded suffrage through informal "conventions" rather than formal amendments.⁴⁵³ By the 1840s, Rhode Island was not only exceptional but the *only* state that had not undergone reform by convention. Hence, the question of *which status quo ante* was being preserved was far from clear – to the Rhode Island oligarchy, it was the constituted charter, to the Whig and Democratic popular opinion, it was the expansion of representation by using the informal but 70 year old

⁴⁵¹ Sean Wilentz, *The Rise of American Democracy*, 539-40.

⁴⁵² Keyssar, 72.

⁴⁵³ Keyssar writes that "Between 1790 and the 1850s, every state (there were thirty-one by 1855) held at least one constitutional convention, and more than a few held several." *The Right to Vote*, 26-7. See also, Wilentz, *The Rise of American Democracy*; Gordon Wood, *The Radicalism of the American Revolution*, 294;

tradition of constitution-making by convention.⁴⁵⁴

After the People's Constitution was ratified, the charter legislature responded by declaring the new government treasonous and began arresting the Dorrites, led by the Thomas Dorr, elected governor by the new constitution. Dorr fought back, gaining control of most of the local state militia. Finally, the charter Governor, unable to depend on the ordinary militia, declared martial law over the entire state, and commissioned federal troops to savagely suppress the movement by force. Luther, a Dorrite who was imprisoned under martial law, sued a military officer for breaking and entering, arguing that the charter under which the officer had acted had no legal force. *Luther v. Borden*, which mounted a direct legal challenge to martial law in the name of the constituent power of the people of Rhode Island, reached the Court in 1848.⁴⁵⁵

The majority was not persuaded by the argument that the new People's Constitution was the only legally valid source of law in Rhode Island. At the same time, the declaration of martial law and commissarial emergency powers of the federal militia meant that the charter constitution was not in effect either. Instead, the court argued that a judicial determination of whether the constituted or constituent power was the source of law involved "political questions" that are by nature non-judicial.⁴⁵⁶ Noting that federal troops were commissioned to crush the rebellion, and the charter government introduced a new constitution according to its own procedures, the Court acknowledge the legal authority of the constituted power, and by logical induction, its authority to declare martial law and commissarial emergency powers.⁴⁵⁷ Since the crime paradigm was disrupted and martial law was legitimately in place, Luther had no grounds to sue the military officer for breaking and entering.

⁴⁵⁴ Keyssar, *Right to Vote*, 75.

⁴⁵⁵ See George Dennison, "Martial Law" and Harvard Law Review Note, "Political Rights as Political Questions: the Paradox of *Luther v. Borden*," *Harvard Law Review* 100, no. 5 (1987).

⁴⁵⁶ *Ibid.*, 47

⁴⁵⁷ *ibid.*, 43

One might argue that the Court was remaining consistent with the theoretical basis of martial law and the meaning of effective internal sovereignty. The clash between the constituent power's right to create a new constitution, and the constituted power's rejection of that claim create a condition in which there is no common superior judge. In other words, judicially the Court can only recognize Rhode Island as a condition where internal sovereignty had been disrupted.⁴⁵⁸ Since the new constitution rejected the authority of any constituted state court, Rhode Island was by definition in a condition where no common, superior judicial authority existed. From this perspective, ordinary procedures of justice were disrupted, meeting the conditions for imposing martial law.

Interpreted this way, the 'political question' doctrine effectively meant that the question of who could claim to represent the *status quo ante* and had authority to commission emergency powers could not be decided judicially but only politically. The court could only recognize the side that "won" the conflict, and rule accordingly. While this may be logically consistent, it is especially notable how this conclusion illustrates the ironic inversion of the classical paradigm's rigid restrictions when the character of the emergency is determined by *who* is counted as part of the constitutionally defined body politic. In such circumstances, the extraordinarily strict limitations imposed by the martial law definition of emergency powers amount to little more than the more familiarly "realist" criteria of which side can impose order and defeat its opponents. When the lines between the included and the excluded were as clear and stable as the lines between war and peace, the paradigm could claim a remarkable degree of both internal theoretical consistency and constitutional protectiveness. The mounting constitutional pressures, however, exerted by democratization and demands for inclusion brought such "penumbral" cases

⁴⁵⁸ *ibid.*, 43

in the classical paradigm of emergency powers increasingly to the forefront.⁴⁵⁹

Civil War and Reconstruction

I want to briefly bring all of these threads together through an analysis of perhaps the most well known 19th century case dealing with emergency powers: *ex parte Milligan* (1866). *Milligan*'s frequently cited majority dictum is an eloquent restatement of the principles of the classical paradigm. Ironically, *Milligan*'s paradigmatic depiction could also be regarded as confirmation of Hegel's famous observation that the owl of Minerva only flies at dusk.⁴⁶⁰ In bringing together all of the strands I have discussed so far – executive prerogative, peace and war and the problem of exclusion – I shall argue that in spite of the self-confidence of its ringing endorsement, *Milligan* illustrates the increasing tension and contradictions encountered by the classical paradigm. While the decision is still valid precedent, I shall argue in section II that later 19th century attempts to formally adhere to *Milligan* brought the classic paradigm to a point of collapse. And in section III, we shall see how *Quirin* (1942) “updated” *Milligan* by emptying it of any possible content it might have. For now, though, I want to briefly mention the tensions and contradictions surrounding the apparently unequivocal decision.

These tensions are already present at the outset of the Civil War. Lincoln's actions in 1861 have been often been interpreted as classic examples of constitutional dictatorship as well as “extralegal” prerogative.⁴⁶¹ This is at least partially correct, but it overlooks an important distinction from these models that the Civil War brought to the outset. When the Confederacy initiated the war, Lincoln did not wait for Congress to assemble. He responded without Congress

⁴⁵⁹ On the concept of penubral cases, see H.L.A. Hart, *Positivism*, 62-4.

⁴⁶⁰ Hegel, *Elements of the Philosophy of Right*, Introduction.

⁴⁶¹ Schmitt, *Dictatorship*; Rossiter, *Constitutional Dictatorship*; Peter Irons, *War Powers*; Oren Gross, *Law in Times of Crisis*.

by calling forth state militia, suspending habeas corpus in areas sympathetic to the South, and placed a blockade on Southern states, all war and emergency powers that are constitutionally reserved for Congress. When Chief Justice Taney ruled that Lincoln had no authority to suspend the writ and commanded that an individual being held must be tried or released, Lincoln flatly ignored the ruling.⁴⁶² Unlike the examples we have previously been discussing with martial law, most scholars agree that these actions were facially unconstitutional by any conventional standard.⁴⁶³ They also appear to best meet the criteria of “necessity” and “self-preservation” cited by Lobel. Hence, we could regard these as examples of the prerogative in the sense I have defined the term.

Interestingly, however, when Lincoln defended his actions to a special session of Congress three months later, he did not directly invoke the Jeffersonian paradigm and frankly acknowledged illegality. Rather, he launched a vigorous constitutional defense of his actions stemming from his position as commander in chief and his oath to faithfully execute the laws. Only later in the speech does Lincoln refer the prerogative justification. “Whether strictly legal or not,” he asserts that his measures were justified by necessity and public demand. Moreover, he calls on Congress to immediately pass them into legislation, and adds that none of the measures exceeded the constitutional powers of Congress.⁴⁶⁴ Finally, Lincoln argued that

The whole of the laws which were required to be faithfully executed, were being resisted, and failing of execution, in nearly one-third of the States. Must they be allowed to finally fail of execution, even had it been perfectly clear, that by the use of the means necessary to their execution, some single law, made in

⁴⁶² *ex parte Merryman* (1961). For a lively retelling of the incident, see Geoffrey Stone, *Perilous Times*, chap. 2.

⁴⁶³ Rossiter, *Constitutional Dictatorship*, 224-8; Daniel Farber, *Lincoln’s Constitution*, chap.

⁴⁶⁴ “These measures, whether strictly legal or not, were ventured upon, under what appeared to be a popular demand, and a public necessity; trusting, then as now, that Congress would readily ratify them. It is believed that nothing has been done beyond the constitutional competency of Congress.” Message to Congress in Special Session, July 4, 1861.

such extreme tenderness of the citizen's liberty, that practically, it relieves more of the guilty, than of the innocent, should, to a very limited extent, be violated? To state the question more directly, are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated? Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?⁴⁶⁵

This passage appears to conform to the “extralegal model,” admitting that “one law,” “to a very limited extent” was violated, but only by necessity. In fact, Lincoln’s speech subtly incorporates the Jeffersonian justification within a very different understanding of constitutionalism itself. The result is to radically transform the earlier justification entirely. Lincoln’s address to Congress leaves no ambiguity as to what is being preserved: not the state or the social order but the Constitution. But it would be a mistake to identify the Constitution invoked by Lincoln directly with the constitutional text itself. At the moment of Lincoln’s speech, the interpretation of the constitution was more fundamentally contested, and carried higher stakes, than perhaps at any other period in American history. Lincoln’s own party had campaigned for office on the vow of overturning the legally binding if morally appalling *Dred Scott* decision of the Supreme Court. However practically implausible the constitutional argument for secession may have been, it could claim a distinguished lineage of interpretation from John C. Calhoun, Andrew Jackson to Thomas Jefferson and even, arguably, James Madison. While this argument for “nullification” was always contested, the closest the constitutional text itself came to directly addressing the matter was the 10th Amendment, which appeared to place the secessionist case on firmer textualist ground. In any case, the argument that violating one law was necessary in order to save

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the constitutional as a whole actually begs the fundamental question of *what* the constitution as a “whole” is, and what it requires. The secessionist case was that it was a legally binding contract between independent sovereign states; by violating the terms of the contract, it is the federal government, acting in the name of the union of the “People,” that violated the terms of the contract and therefore dissolved the union. Lincoln’s understanding reverses this: the “People” forming a more perfect union is not a voluntary association but the historical and national bond of the Nation, inseparable from the constitution itself. If one “single law” threatens to destroy the People embodied in the constitution, then the constitution itself requires that the single law be violated to preserve the whole.⁴⁶⁶

The theoretical underpinnings of this idea of constitutionalized emergency powers incorporate late 18th century constitutional theories of the constituent power with a historical conception of the Nation that belongs to the moment of progressive liberal nationalism of the mid-19th century.⁴⁶⁷ For Lincoln, the People which constituted itself to form a more perfect Union cannot be reduced to a static legal contract. It is a Nation, a historical actuality and a process of self-realization that is progressively determined through the constitutional procedures the Nation gives itself. The Nation was *not* a creation of the text of the constitution itself but the common destiny set in motion by the Declaration of Independence and the War with Great Britain: “four score and seven years ago” does *not* refer to the ratification of the constitution in 1789 but to the declaration of an independent Nation in 1776.⁴⁶⁸ In this Republican, “nationalist” constitutional theory, individual constitutional provisions shift subtly to the margins, while the immanent

⁴⁶⁶ See George Fletcher, *Our Secret Constitution*. In contrast, see Daniel Farber *Lincoln’s Constitution*,

⁴⁶⁷ cf. Eric Hobsbawm, *Nations and Nationalism Since 1780*, chapters 1, 3. For a contrasting account, see Benedict Anderson, *Imagined Communities*, chap. 3.

⁴⁶⁸ Gettysburg Address, 1863. “Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal... we here highly resolve that these dead shall not have died in vain -- that this nation, under God, shall have a new birth of freedom -- and that government of the people, by the people, for the people, shall not perish from the earth.”

principles set out in the Preamble and, especially, the Declaration of Independence occupy the center of the constitutional system. In his first inaugural address, Lincoln lays out this theory, arguing that the positive constitution may be transformed by convention or abolished by revolution. But only the Nation itself can do these things, it cannot reverse history and undo its own unity.⁴⁶⁹ The “common bonds of affection” uniting the people are a historical actuality, which gives the constitution its legitimacy and binding force.⁴⁷⁰ As the Republican national platform of 1860 declared,

The maintenance of the principles promulgated in the Declaration of Independence and embodied in the Federal Constitution, “That all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness; that to secure these rights governments are instituted among men deriving their just powers from the consent of the governed,” is essential to the preservation of our Republican institutions; and that the Federal Constitution, the Rights of the States, and the Union of the States, must and shall be preserved.⁴⁷¹

In the context of the constitutional debate then raging around *Dred Scott* and secession, the notion that preserving the constitution amounted to defending the principle that “all men are created equal” was not in any sense conservative; it was *revolutionary*. The extraordinary powers

⁴⁶⁹ “This country, with its institutions, belongs to the people who inhabit it. Whenever they shall grow weary of the existing Government, they can exercise their *constitutional* right of amending it or their *revolutionary* right to dismember or overthrow it. I can not be ignorant of the fact that many worthy and patriotic citizens are desirous of having the National Constitution amended. While I make no recommendation of amendments, I fully recognize the rightful authority of the people over the whole subject, to be exercised in either of the modes prescribed in the instrument itself; and I should, under existing circumstances, favor rather than oppose a fair opportunity being afforded the people to act upon it.” First Inaugural, 1861.

⁴⁷⁰ Hence the famous closing words of the first inaugural: “We are not enemies, but friends. We must not be enemies. Though passion may have strained it must not break our bonds of affection. The mystic chords of memory, stretching from every battlefield and patriot grave to every living heart and hearthstone all over this broad land, will yet swell the chorus of the Union, when again touched, as surely they will be, by the better angels of our nature.”

⁴⁷¹ Quoted in Lazare, *The Frozen Republic*, 107-8.

such a theory would authorize could not in any straightforward sense restore the status quo ante of a nation “half slave and half free”; rather, it suggests that the founding principles of the Declaration can be preserved only by breaking through the constitutional deadlocks and compromises that prevent the realization of those principles and pervert them.

Lincoln’s account of constitutionalized emergency powers, therefore, cannot be separated from the progressive nationalist vision that animated his constitutional theory in general. Unlike his more radically abolitionist colleagues, the emergency for Lincoln first and foremost was not slavery itself but the direct assault by secession on the historical union that is the precondition for the constitution. In such an extraordinary emergency, Lincoln’s violation of “one single law” to preserve the union is not only within constitutional authority, it is an absolute *requirement* of the Constitution. Finally, immediately following the passage quoted above, Lincoln finalizes his break with the 18th century idea of “extralegal” emergency powers. After giving a constitutional justification of illegality, he concluded that “it was not believed that this question [of illegality] was presented. It was not believed that any law was violated.”⁴⁷² Throughout the war, he repeated similar versions of this argument justifying the violation of *one* law in order to preserve *all* the laws, then suggesting, however ambivalently, that this logic provided legal authorization even for admitted case in which a single law was violated.⁴⁷³

Lincoln’s argument, despite its ambiguities, is in some tension with the classical paradigm. Whereas the classical prerogative acted outside the constitution in order to preserve a

⁴⁷² Message to Congress, 1861. After Lincoln’s address, Attorney General Edward Bates submitted a lengthy argument for the constitutionality of Lincoln’s actions that went far beyond anything claimed by Lincoln, claiming inherent presidential war powers and in some ways prefiguring later 20th century theories of the plenary powers of the executive, at least during war. See Opinion of Attorney General Bates 74, 81 (1861). This is given extensive treatment in James Randall, *Constitutional Problems under Lincoln* (1926).

⁴⁷³ “I felt that measures, otherwise unconstitutional, might become lawful by becoming indispensable to the preservation of the institution, therefore the preservation of the nation... I could not feel that, to the best of my ability, I had even tried to preserve the Constitution if, to save slavery, or any minor matter, I should permit the wreck of government, country, and Constitution all together.” Quoted in Paludan, *A Covenant with Death*, 19-21.

rigid textual adherence to its boundaries, Lincoln's much more capacious, nationalist constitutional theory gives priority to the historical "bonds of affection" of national destiny over any rigidly textualist limitations that contradict that basis. Moreover, it ties the normative essence of the constitution to an unending quest for a more perfect union through the progressive realization of equality and freedom through history. This did not mean that Lincoln prioritized the abolition of slavery of everything else. Famously, he did not.⁴⁷⁴ But it does mean that he was prepared to violate "one law" to transform the textualist impediments that were tearing apart the union by creating a *new* condition, rather than restoring an old one. Lincoln's emergency powers was not limited to restoring the *status quo ante* but extended to the creation of a new, transformed *status quo*. If a return to the *status quo* meant returning to the textualist contradictions that created the crisis in the first place, Lincoln was prepared to use emergency powers to *conserve* the historical trajectory of the nation by *transforming* the constitutional contradictions that were textually frozen in place. Of course, as it became increasingly clear that the union could only be saved by abolishing slavery, Lincoln did so by executive proclamation, moving even further across the blurred line between conservative and revolutionary emergency powers, or what following Carl Schmitt we have called commissarial and sovereign dictatorship. We have seen an example of commissarial emergency powers in the suppression of the Dorr rebellion in the previous section. For Schmitt, both commissarial and sovereign dictatorship are technically commissioned forms of emergency powers. Whereas commissarial dictatorship is commissioned by the *constituted* power, sovereign dictatorship is commissioned by the *constituent* power. And its purpose is to create a *new* constitutional order rather than preserve the old one.⁴⁷⁵ Whereas Schmitt suggested that the legitimacy of commissarial dictatorship is legality

⁴⁷⁴ Quote first inaugural again

⁴⁷⁵ Schmitt, *La Dictature*, 147

itself (i.e., the legality of the constituted power), the source of legitimacy of sovereignty dictatorship is not legality but democratic popular sovereignty.⁴⁷⁶

Reconstruction Congress between commissarial and sovereign dictatorship

Lincoln's own theory navigated with characteristic subtlety and ambivalence between the commissarial and sovereign models, combining elements of each but never unambiguously assuming the position of either. Many in the increasingly powerful radical wing of the Republican party, however, didn't share this ambivalence. "For one, I don't care a rag for 'the Union as it was,'" as one abolitionist Union soldier declared. "I want to fight for the Union better than it was."⁴⁷⁷ Under the ideological leadership of the radical Republicans, it was Congress rather than the executive that placed itself in the revolutionary vanguard, struggling to act as a sovereign dictatorship. Thaddeus Stevens, the imposing Republican leader in the House, best embodied the quest to convert Congress into a revolutionary instrument of unconstrained sovereignty. In 1862, he declared of slaveholders:

I would seize every foot of land, and every dollar of their property as our armies go along, and put it to the uses of the war, to the pay of our debts. I would plant the South with a military colony if I could not make them submit otherwise. I would sell their land to the soldiers of independence; I would send those soldiers there with arms in their hands to occupy the heritage of traitors, and build up there a land of free men and of freedom, which, fifty years hence, would swarm with its hundreds of millions without a slave upon its soil.⁴⁷⁸

⁴⁷⁶ Arato, "Goodbye to Dictatorship?"

⁴⁷⁷ 113.

⁴⁷⁸ Quoted in Lazare, 116.

Congress' attempt to impose a radical reconstruction on the South after 1865 was an even more direct expression of the sovereign dictatorial model than its posture during the war. But the peculiarity of the American reconstruction was that Congress' sovereign dictatorship continued to cloak itself in commissarial garb. While clearly engaging in an extraordinary attempt to fashion a radically new constitutional order, Congress' attempted to do so in formally commissarial terms, creating a unique set of dynamics that were not captured by Schmitt's clear-cut distinctions. I shall return to these dynamics in reconstruction in a moment, but first I want to turn back to *Milligan*'s rejection of sovereign dictatorship and insistence on the classical model. I shall argue that this reversion to the classic martial law paradigm, however, was a paradoxical one that directly called into question the basic coordinates of that paradigm. The broader political context of the case effectively pitted the due process and equal protection rights claimed by white Southerners under the antebellum, slaveholding constitution against the attempt to extend those same rights to former slaves. The wider paradox of *Milligan*, therefore, is that its principled refusal to allow the suspension of the rights associated with the crime paradigm...

In 1863, Congress enacted a statute authorizing the president to suspend habeas corpus "whenever, in his judgment, the public safety may require it." The president empowered generals to declare martial law in several border states and detained individuals without charge, and numerous individuals were tried for violations of the laws of war by military tribunal.⁴⁷⁹ One such conviction reached the Supreme Court on appeal in 1866, after the war was over.⁴⁸⁰ Justice Davis, writing for the majority, ruled that the military tribunal that tried Milligan was

⁴⁷⁹ There was great variation in the severity of military justice, depending on the general in charge of the region. In all cases, Lincoln insisted on reviewing all death penalty convictions, and commuted numerous sentences. See Stone, *Perilous Times*, chap. 2.

⁴⁸⁰ In 1864 a military tribunal tried Lampan Milligan for sedition. At the time, the circuit court in Indianapolis was open and functioning. He was found guilty, and sentenced to death. By the time the sentence reached the president for review, the war was over and President Johnson approved the death sentence. Milligan asked the circuit court for a writ of habeas corpus, and the case was referred to the Supreme Court.

unauthorized, and that he should be released. The majority acknowledged that Congress possessed the authority to suspend habeas corpus in cases of war and insurrection, as it did in 1863. Congress possesses this emergency power even where effective internal sovereignty is *threatened* but not actually *disrupted*.⁴⁸¹ It also recognized that the purely military power to declare martial law “when war exists in a community and the courts and civil authorities are overthrown” and try offenses against the laws of war by military tribunals.⁴⁸² But it sharply distinguished the *emergency* power to suspend habeas corpus from the *military* power to declare martial law and constitute military tribunals. The former only allows prisoners to be *held*, but it does not permit the military to *try* offenses under the laws of war. Hence, the tribunal that convicted Milligan in Indiana, where ordinary courts were open and functioning, had no jurisdiction under the constitution.

In ringing terms, the Justice Davis forcefully asserted the inviolability of the boundary between war and peace, enmity and crime. There is “No graver question,” he asserted, than the fundamental, ordering distinction between the paradigms of war and crime.

[i]t is the birthright of every American citizen when charged with crime, to be tried and punished according to law. The power of punishment is, alone through the means which the laws have provided for that purpose, and if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety.⁴⁸³

⁴⁸¹ 115

⁴⁸² 125, 127.

⁴⁸³ 119

The government lawyers argued that the military tribunal's jurisdiction was established by "the laws and usages of war." Miller rejected this as an impermissible blurring of the lines between war and peace. The laws of war "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed."⁴⁸⁴ In other words, even if Congress had attempted to grant jurisdiction to the tribunal (which it had not),⁴⁸⁵ it had absolutely no power to do so.⁴⁸⁶ Martial law and military tribunals have absolutely no jurisdiction over civilians under *any* conditions, no matter how insecure, when effective internal sovereignty is in place, i.e. when ordinary courts can physically continue functioning.

The abeyance of internal sovereignty "must be actual and present; the invasion real" and courts must be physically in a state of incapacitation. "Martial law cannot arise from a threatened invasion" no matter how serious.⁴⁸⁷ If the line separating actual physical breakdown of internal sovereignty from the *threat* of breakdown were allowed to be blurred, this would allow the law of war positive validity within the body politic, effectively surrender the orienting distinction between war and peace.

The decision's most frequently quoted passage affirms the classical paradigm I have been describing in sweeping and eloquent terms:

The constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all

⁴⁸⁴ 212

⁴⁸⁵ The Court also argued that, not only had Congress not intended to give jurisdiction to military tribunals, but the procedures stipulated in the 1863 legislation had been violated in Milligan's case. Among other irregularities, the tribunal violated the 1863 statute's provision that lists of all prisoners held in states where ordinary courts were functioning were to be furnished to federal courts. If a grand jury did not indict, they were supposed to be released after 20 days.

⁴⁸⁶ "in Indiana the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any offence whatever of a citizen in civil life, in nowise connected with the military service. Congress could grant no such power..." (122).

⁴⁸⁷ 127.

circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority... When peace prevails, and the authority of the government is undisputed, there is no difficulty of preserving the safeguards of liberty; for the ordinary modes of trial are never neglected, and no one wishes it otherwise; but if society is disturbed by civil commotion-if the passions of men are aroused and the restraints of law weakened, if not disregarded- these safeguards need, and should receive, the watchful care of those entrusted with the guardianship of the Constitution and laws.⁴⁸⁸

There is no clearer statement of what I have called the “classical paradigm” of war and emergency powers. Yet, the actual political stakes of the decision were far from straightforward, cutting to the heart of the complex interplay between sovereign and commissarial dictatorship mentioned earlier. The jurisdiction of military tribunals was a burning issue in 1866. But they were *not* being used to try supporters of the ongoing Confederate war effort, which had already been decisively defeated the previous year. Rather, military tribunals were imposed in this period throughout the occupied South. Military jurisdiction in the South was often the only chance for southern blacks to get a fair trial, since local juries and state judges were not about to recognize the equal rights of former slaves.⁴⁸⁹ *Milligan*’s eloquent dictum was interpreted by both sides as an attempt to limit Congress’ power to shaping the meaning of the outcome of the Civil War, the

⁴⁸⁸ *Ex parte Milligan*.

⁴⁸⁹ The best discussion of the reaction to the opinion can still be found in Earl Warren, *The Supreme Court in the United States History*, Vol. III, (1922), 149-90.

abolition of slavery.⁴⁹⁰ Discussions of *Milligan* in emergency powers literature overwhelmingly tend to overlook the actual politics of the emergency powers and military tribunals it directly affected, presenting a one-dimensional and oversimplified account of the theory expressed in the decision.⁴⁹¹ The emergency military tribunals actually affected by the decision exceeded the straightforward crime/war distinction presented in the case. Instead they related directly to the unresolved question of what the post-war constitutional *status quo* would be, or how the very meaning of effective internal sovereignty and the unimpaired functioning of local courts was to be defined. Could civil courts be regarded as “open and functioning” when southern states passed legislation legally stripping blacks of any rights to access them? Did the abolition of slavery imply a new form of citizenship and national inclusion that would alter the structure of internal sovereignty itself, or was the creation of a *de jure* regime of racial hierarchy consistent with, and even required by, the terms of the classical paradigm?

The fact that these penumbral questions do not register in the language of the opinion suggests that *Milligan* is less an exemplar of the classical paradigm than its owl of Minerva. The struggle it entered into was not the boundaries of the pre-War *status quo ante* but a constitutional struggle over the new, transformed order that had been created by the North’s military victory. How much must the sovereign dictator present itself in commissarial garb, and what concrete limitations do they impose? By 1866, the sovereign/commissarial agent was not the President but Congress, which struggled to maintain control over the reconstruction of the defeated South.

At the time of *Milligan*, Congress was dominated by northern republicans committed to a thorough reorganization of the South’s social order. The question was whether Congress was a temporary a rump body which must limit itself to restoring the full representation of the states, or

⁴⁹⁰ The following discussion of reconstruction is heavily indebted throughout to Daniel Kato, *Constitutional Anarchy* (PhD Dissertation, New School for Social Research).

⁴⁹¹ See, for example, Fisher, Irons, Cole, Dyzenhaus.

whether it could transform the conditions of state representation itself to reconstitute the terms on which the South could be represented.⁴⁹² In other words, was the rump Congress a commissarial dictator prevented from transforming the status quo, or a sovereign dictator imposing an entirely new constitutional order? The meaning of the Civil War's achievement of abolishing slavery, as well as the most radical political enfranchisement and subsequent disenfranchisement of a group of citizens in any constitutional democracy, hung in the balance.⁴⁹³

The struggle related directly to the problems of rigid constitutionalism, emergency powers and boundaries of the body politic. The 13th Amendment abolished slavery, but did not establish citizenship for ex-slaves and it left suffrage restrictions entirely in the hands of states. Earlier that year, Congress passed the civil rights act over the president's veto, authorizing military enforcement of blacks' increasingly precarious civil rights. But this was achieved as a temporary exercise of emergency powers, not the creation of a new normalcy. Without constitutional entrenchment, the fragile status of equal citizenship would be rapidly undone, because after the emergency southern states would be free to strip ex-slaves of citizenship and deny them suffrage. The contours of this alternative were already clear when southern states passed the Black Codes in 1865-6, which legally codified the status of blacks as an inferior and dependent racial case, prevented from owning, renting or transferring property, engaging in skilled employment or seeking access to courts.⁴⁹⁴

Moreover, whereas before the Civil War southern states were allowed to count each slave as 3/5ths of a person in apportioning representation in the House, the 13th Amendment allowed those states to count each ex-slave as a full person for apportionment in the House, even if they

⁴⁹² Bruce Ackerman calls this a "convention/congress," whereas the plans of radical republican leaders such as Thaddeus Stevens more approximated what Carl Schmitt called "sovereign dictatorship."

⁴⁹³ Valelly, *The Two Reconstructions*, Preface.

⁴⁹⁴ Forbath, "Caste, Class and Equal Citizenship," 27.

were denied suffrage and equal civil rights. The bizarre irony was that under this scenario, southern white supremacy would enjoy an even more inflated overrepresentation in Congress than it did before the Civil War. Adding to the urgency, even in its temporarily purged form Congress' plans for radical reconstruction encountered fierce opposition from more conservative forces from the other branches, as we've seen in *Milligan*. Much more formidable than the court was the opposition of President Johnson, who was alarmed at Congress' "ill timed and uncalled for" plans to guarantee equal rights for blacks. Johnson justified his opposition by arguing that Congress had no right to impose its will on the South until the emergency measures were over and southern representation could return to Congress on its own terms. In other words, the rump Congress is strictly limited to a commissarial role. As these political struggles played out, conditions in the occupied South slipped increasingly out of control as white mobs attacks on blacks became commonplace, and groups such as the Ku Klux Klan stepped into the vacuum left by the disorder in national will.⁴⁹⁵

Congress' strategy was to transform itself from commissarial to sovereign dictator through a series of ingenious constitutional maneuvers. The 13th Amendment, abolishing slavery, had been passed only by installing a series of Southern minority state governments under military tutelage, which passed the amendment against the wishes of the majority of the white populations. The passage of the 14th Amendment was even more extraordinary. Under intense opposition from the president, Congress approved the amendment by simply ignoring the representatives from the former slave-owning states. The rump Congress then forced the Amendment through Article V procedures by instructed the southern states under military occupation that readmission to the Union would be conditional on their ratification of the

⁴⁹⁵ Kato, *Constitutional Anarchy*; Ackerman, *We the People vol. II*; Lazare, *The Frozen Republic*, 125.

Amendment. Without submitting to the entrenchment of the transformed constitutional order, southern states would remain excluded and the emergency would continue.⁴⁹⁶ These extraordinarily convoluted procedures are the result of Congress' intricate attempt to exercise the substance of a revolutionary sovereignty dictatorship within the form of a commissarial one.

For a period, especially after Congress' sweeping electoral victory in 1866, the plan appeared to be working. Military control over the South was tightened: the Supreme Court's jurisdiction was stripped (Congress' outraged response to *Milligan*), and military tribunals took back jurisdiction when southern courts were demonstrably incapable of fair trials involving blacks. A new, bi-racial electoral democracy began to take shape in the south as avowedly disloyal, pro-confederate forces were purged from southern state legislatures and black voters constituted majorities in five states and near-majorities in many others. In a revolutionary transformation that rivals 1848 or 1917, blacks competed for and won elections in districts where they had been enslaved a decade earlier. In the regime of civil equality imposed on the South, the outlines of a new north/south racial coalition could be glimpsed.⁴⁹⁷

Of course, in spite of these extraordinary constitutional maneuvers that allowed the de facto sovereign dictatorship, the other branches struggled to reassert control. Johnson, emboldened by his acquittal in his impeachment trial, counterattacked by loosening the military grip on reconstruction enough for white supremacist southern forces to regain the upper hand. As the course of reconstruction faltered, the republicans' retreated from their precarious constitutional position and began to acknowledge the new normality. Literacy tests and numerous other mechanisms for black disenfranchisement were left unprohibited by the 15th Amendment, and subsequent judicial interpretations of the 14th Amendment finished the process

⁴⁹⁶ Ackerman; Lazare

⁴⁹⁷ Daniel Lazare, *The Frozen Republic*, chap. 5; Richard Valelly, *The Two Reconstructions* chaps. 2-4; Eric Foner, *A Short History of Reconstruction*, chap. 7-9

of gutting its radical republican content,⁴⁹⁸ giving way to the familiar history of the Jim Crow South.⁴⁹⁹

Conclusion

This chapter has argued that the concept of martial law, rather than extralegal prerogative, was the central theoretical and constitutional framework for emergency powers in the early American republic. Focusing on martial law rather than prerogative has a number of advantages. First, it corresponds more directly to historical practices and avoids the definitional blurring of emergency powers with ordinary *external* war and presidential powers. Secondly, the framework of martial law illuminates the theoretical significance of emergency powers in relation to modern constitutional theory's foundational opposition between the internal legal order and external state of war. We have seen that the early American paradigm of emergency powers derived its criteria and specificity directly from this conceptual opposition: emergency powers may be exercised only when a disruption of effective internal sovereignty is actually present. Finally, we've seen that the initial clarity and determinateness of the martial law paradigm became increasingly called into question when membership in the body politic – and therefore the status of constitutional status quo – could no longer be presupposed but was itself determined the legitimacy or illegitimacy of the emergency measures in question, leading to a vicious (or penumbral) constitutional circle. As we've seen in the Dorr Rebellion and Reconstruction, processes of democratic inclusion and incorporation in this period raised the “penumbral” issue of whether the emergency powers in question were sovereign or commissarial; a question the martial law paradigm could only answer by reference to the thoroughly “realist” criteria of which

⁴⁹⁸ See the *Slaughterhouse* cases and especially *U.S. v Cruikshank* (1876).

⁴⁹⁹ See Lazare, chap. 5; Valelly, chap. 6; Foner, chaps. 9, 11, 12. For a more optimistic interpretation, see Bruce Ackerman, *We the People* vol. II, chaps. 7-8.

side won the conflict (*Luther v. Borden*), or by avoiding and obfuscating the issue altogether (*ex parte Milligan*).

As we shall see in Chapter IV, by the turn of the century, individual states regularly declared martial law in response to the fierce labor conflicts that characterized this period. But the regularity of these declarations of martial law, and the evident lack of any disruption of internal sovereignty, made the classical paradigm inapplicable. Rather than declare the emergency powers themselves unconstitutional, courts responded by abandoning the category of martial law and its accompanying criteria of effective internal sovereignty, and upheld the measures through a new theory of executive power, and a new criteria of *emergency*. Similarly, a series of early First Amendment cases during WWI employed a theory of “emergency” to help define the limitations and boundaries of the political public sphere, distinguishing between constitutionally protected speech, and criminal speech that poses a “clear and present danger” during an emergency. This new, explicit recognition of external “emergency” conditions allowed the courts to draw a line separating ordinary constitutional rights and the state’s coercive power without reference to effective internal sovereignty and the ability of courts to function. While formally and textually persisting in the legal code, martial law as a paradigm for adjudicating emergency powers was effectively finished. This intermediary, second paradigm of emergency powers, however, tied the concept of emergency to a clear a present *danger* to state institutions. The New Deal jurisprudence of the economic emergency will represent a further shift, substituting *security* for *danger* as a criterion for emergency powers.

It will be necessary to review these background conceptual transformations in order to adequately weigh the substantive charges that lie behind the formal textual continuity of emergency institutions that I referred to at the outset of this chapter. When martial law and

military tribunals were reintroduced at the end of WWII and in subsequent decades, they were decoupled from the black and white contrasts between war and peace, and enmity and crime, that characterized the paradigm described in this chapter. Instead, as we shall see, the post-WWII invocation of these categories replaced the category of war with police actions, and the criterion of effective internal sovereignty with that of security. These material constitutional shifts gave rise to an entirely new constellation that posed fundamental challenges to the theoretical architecture of constitutionalism itself: the status of unlawful enemy combatant threatened to fuse the categories of crime and enmity, and the international police powers of a global hegemon risked undermining the separation of powers internally and the fragile achievements of international law externally. Finally, the emergence of security as a novel category for linking the state to society posed new complications for the very dynamics of democratic legitimacy that helped to expose the limits of the classical paradigm in the first place.

Chapter V

Emergencies and Security in the New Deal

Just as everything King Midas touched turned into gold, everything to which the law refers becomes law, i.e. something legally existing. The case of absolute nullity lies beyond the law.

--Hans Kelsen, *General Theory of Law and State*, 1945.⁵⁰⁰

Emergency measures imply that they are directed to meet an emergency, but the present world-wide chaos is not a condition from which the world can emerge on a basis of assured and general prosperity, without fundamental changes in the economic systems of every major nation...

--John Dewey, "Superficial Treatment Must Fail," 1933.⁵⁰¹

In the previous chapter we saw an example of how the antebellum American constitutional order and political vocabularies helped to shape a remarkably restrictive, minimalist understanding of "emergency powers" and at the same time an unrestrained, maximalist "state of exception" organized around spatial rather than temporal lines. The fundamental distinction in that paradigm was not the extent of state power itself, but whether that power was exercised inside or outside the body politic, over independent citizens or dependent subjects. Accordingly, events that would unquestionably count as severe "emergencies" today – including even insurrection and invasion in some cases – were regarded as within the scope of constitutional "normality," insufficient to justify even limited emergency powers. Conversely, we saw that even the most restrictive constitutional interpretations did not object to extra-constitutional prerogative power over imperial "subjects" – Indians, blacks and other groups excluded from the body politic – that amounted to a permanent state of sovereign exception.

The contrast between the 19th century emergency paradigm and that of the present illustrates the extent to which the categories of emergency and exception should not be regarded

⁵⁰⁰ Kelsen, *General Theory of Law and State*, 161.

⁵⁰¹ John Dewey, *The Later Works*, Vol. 9, 261

as transparent representations of an independent reality, but rather as means through which a particular political reality is constructed and organized. Much of this chapter focuses on a relatively short period – chiefly, the constitutional struggle over the New Deal between 1934 and 1937 – during which the political and constitutional meaning of norm and exception, ordinary and emergency powers, underwent dramatic transformation. This period, therefore, merits close examination for three main reasons. First, it provides a unique example of the politics of emergencies in formation. As we shall see, there was nothing natural or inevitable about the fact that the constitutional meaning of the New Deal would be determined on the field of emergency powers. The categorization of social and economic conditions as “emergencies,” and of the New Deal programs as “emergency powers” was sharply contested on both the left and the right in a broad public debate over the constitutional and democratic meaning of the reforms. We can see how intense political pressures and deep conflict actual reorganization of the constitutional space of normality and exceptionality, and the construction of a novel field of emergency politics.

Secondly, the new framework of emergency powers that emerged marked the definitive end of the older republican framework analyzed in the previous chapter. The new framework that bypassed the categorical distinctions and rigid oppositions described in the previous chapter, and drew instead from police powers and the idea of security to forge a new source of authority for emergency powers. The new doctrine entailed not only an expansive and fluctuating constitutional source of emergency “police” powers, it also reflected the displacement of the legislature and a new predominance of the executive as the center of gravity in the constitutional system. This gravitational shift marked out new subsidiary tasks for the other branches, in the form of delegative and accomodationalist politics, giving rise to a persistent anxiety over blurring law and politics. Finally, the formidable expansion of executive authority and discretion

provided a new template for plebiscitarianism as a mode of presidential leadership, and established a persistent affinity between emergency and presidential power. The idea that ordinary constitutional powers become more flexible, expansive and discretionary during “emergencies” turns out to be much more difficult to limit and have a greater tendency to become permanent, creating the dynamic of secular accretion of “emergency” power without emergencies.

The significance of this goes far beyond the brief period of constitutional struggle from which it emerged. As I shall argue in chapter 6, starting at the end of the Second World War and the beginning of the cold war, the basic parameters and judicial tests of the New Deal emergency doctrine were reapplied back to the realm of war, armed conflict and enmity. The older categorical dualisms between war and peace, the inside and outside the body politic were replaced by a flexible, expansive constitutional basis of emergency powers, a permissive delegation doctrine, and judicial balancing tests that were developed in relation to internal police and federal regulatory powers. In conjunction with the emergency of the discourse of national security, this period marked the end of formal legislative declarations of war, and the rise of international police powers of the president.

I. Liberty, Security and Emergencies

The experience of traumatic economic collapse and explosion of political unrest, amplified by the apparent collapse of liberalism on the European continent, all contributed to the sense that 19th century liberalism was in crisis, and helped propel security both as a normative ideal and a political imperative to the forefront of American progressive thought, and ultimately, the New

Deal. It did so by elevating security as an ideal in itself, and at the same time as an essential precondition for and component of liberty. Eric Foner, in his history of freedom in American, concludes that “the New Deal recast the idea of freedom by linking it to the expanding power of the national state... [to provide] economic security.”⁵⁰²

The centrality of security in this period was not an invention of the Roosevelt administration. Earlier progressive reformers had attempted, with patchwork success, to expand the responsibility of the state to include providing for citizens’ economic security since the beginning of the 20th century, and progressive intellectuals had been pointing to the links between freedom and security during this same period.⁵⁰³ Moreover, in the 1930s, the link between security and liberty was insisted upon by many of the most reformist public intellectuals of the time. As John A. Ryan, a Catholic social reformer and New Dealer, put it, “Our democracy finds itself... in a new age where not political freedom but social and industrial freedom is the most insistent cry.” Under his influence, the Church reversed its antipathy to state intervention and demanded a government guarantee of continuous employment and “a decent livelihood and adequate security” for all.⁵⁰⁴ Philosopher and public intellectual John Dewey diagnosed the crisis of liberalism as stemming from the emptiness of formal political rights and its inability to incorporate “the social conditions of freedom.” Dewey argued that liberty in the 20th century can no longer refer to freedom of contract and independence from state intervention; rather it “signifies liberation from material insecurity and from the coercions and repressions that prevent multitudes from participation in the vast cultural resources that are at hand.”⁵⁰⁵ The political scientist and theorist Harold Laski, who became close to Roosevelt when teaching in the

⁵⁰² Foner, E. (1999). *The story of American freedom*. London, Picador., 196.

⁵⁰³ Skowronek, S. (1997). *The politics presidents make : leadership from John Adams to Bill Clinton*. Cambridge, Mass., The Belknap Press of Harvard University Press.

⁵⁰⁴ quoted in Foner, *Story of American Freedom*, 196

⁵⁰⁵ Dewey, *Liberalism and Social Action*

United States in the 1930s, echoed this theme in his *Liberty in the Modern State*, arguing that liberty is rendered meaningless without economic security

If [a man] is deprived of security... he becomes the prey of a mental and physical servitude incompatible with the very essence of liberty. Nevertheless, economic security is not liberty, though it is a condition without which liberty is never effective... Without economic security, liberty is not worth having.⁵⁰⁶

Progressive economists and technocrats also attempted to push Roosevelt to the left with the theme of security, in works such as economist Abraham Epstein's *Insecurity: A Challenge to America* and insurance analyst Max Rubinow's *The Quest for Security*. Weekly magazines like *The Nation* and *The New Republic* were forums for such public intellectuals attempting to push the New Deal further to the left by arguing that Roosevelt's measures were too moderate and piecemeal to overcome the deep sources of public insecurity.⁵⁰⁷

Security took center stage in the new union struggles that emerged during the "golden age" of government/union partnership of the New Deal. In contrast to the important role of many communist organizers in this period, as well as the widespread but more spontaneous and uncoordinated labor and agricultural uprisings, this period saw the emergence of the CIO, which organized millions of workers in mass industry and unlike earlier union activism, energetically lobbied with the government to intervene in negotiations and secure social and economic rights. In the words of garment union leader Sidney Hillman, the overwhelming object of the labor

⁵⁰⁶ Herald Lasky, *Liberty in the Modern State*, 50-1. Quoted in Neocleous, *Critique of Security*, 83. By the 1940s Lasky would expend this view in the direct of strong executive powers, arguing that only a powerful and dominant president, using emergency powers when necessary, would be capable of delivering such security in the fragmentary political system of the United States. See, Herald Lasky, *The American Presidency. An Interpretation*

⁵⁰⁷ *The New Republic*, for instance, ran a series of articles in late 1933 and early 34 entitled "Security for America," laying out an extensive critique of the NIRA of failing to provide economic security. See Neocleous, *Critique of Security*, 85.

union was the “quest for security.”⁵⁰⁸ In short, among a broad range of intellectuals, political reformers and in the labor movement, by the early 1930s the crisis of laissez faire liberalism was summed up by its failure to give adequate emphasis to the state’s role in providing security to its citizens. This ascendance of security in the public sphere did not mean that it was a uniform concept. On the contrary, it represented a multilayered and loose convergence around the need to rethink the relationship between the state, society and the individual in the age of industrial capitalism.

Security in the New Deal

Even before taking office, Roosevelt faced criticism from the right for trampling individual liberty, and from the left, for failing to provide economic security to the millions of vulnerable citizens whose lives were ravaged by industrial greed and the imbalances of the unregulated market. His response, expressed in innumerable fireside chats and public addresses, was to adopt his opponents’ language on both flanks, championing security as a necessary precondition for liberty, a fundamental right of citizens, and a no less fundamental duty of any legitimate government.⁵⁰⁹ By 1934, Roosevelt made the theme of security central to his presidency, reiterating the goal of “general greater security” in nearly every speech. The theme of security provided Roosevelt a way to reclaim the ideal of freedom from his opponents on the right, and turn it back against them. In contrast to the laissez-faire ideal of liberty “for the privileged few,” Roosevelt affirmed “that broader definition of Liberty under which we are moving forward to greater freedom, to greater security for the average man than he has ever known before in the

⁵⁰⁸ Foner, *Story of American Freedom*, 199.

⁵⁰⁹ Ibid.

history of America.”⁵¹⁰ Likewise, in his second Inaugural Address, Roosevelt stressed security as a fundamental means that should be guaranteed to all: “We dedicated ourselves to the fulfillment of a vision—to speed the time when there would be for all the people that security and peace essential to the pursuit of happiness.”⁵¹¹ Other times, Roosevelt appeared to describe security as not only a means but as an end in itself:

all the energies of government and business must be directed to increasing the national income, to putting more people into private jobs, to giving security and a feeling of security to all people in all walks of life.... You and I agree that security is our greatest need...Therefore, I am determined to do all in my power to help you attain that security and because I know that the people themselves have a deep conviction that secure prosperity of that kind cannot be a lasting one except on a basis of business fair dealing and a basis where all from the top to the bottom share in the prosperity.

Roosevelt seems to have adopted the theme of security, then, from a range of progressive critics who questioned whether his administration was going far enough to address pervasive insecurity, and refashioned it as the basis for articulating a new social ideal and aim of government.⁵¹²

Police Powers and Republican Dualism

In the previous chapter, I argued, against the tendency of many contemporary scholars influenced by Foucault to assimilate the anglo-American category of police powers to the continental models famously analyzed by Foucault, that police powers in the antebellum US developed along a very different path, and helped to articulate the spatial boundaries between the

⁵¹⁰ Franklin D. Roosevelt, Fireside Chat, September 30, 1934. Available at <http://docs.fdrlibrary.marist.edu/093034.html>

⁵¹¹ Second Inaugural Address, January 20, 1937. Available at <http://www.bartleby.com/124/pres50.html>

⁵¹² Neocleous, *Critique of Security*, 82; Piven, F. F. and R. A. Cloward (1993). Regulating the poor : the functions of public welfare. New York, Vintage Books., 88.

community of self-governing citizens and a “state of exception” in which blacks, native Americans and other outsiders were subject to largely unlimited discretionary powers of external sovereignty. I argued that this distinctively racialized state of exception in the early American republic is easily obscured by an overly schematic application of the category of bio-power or governmentality. Increasingly in the mid-19th century, police powers were increasingly defined as a “conveyence” of the imperial prerogative of the Crown, which passed directly to the individual states after independence and, with the exception of the limited powers delegated to the Federal Government, was maintained by the individual states. Especially as the conflicts over slavery intensified in the mid-nineteenth century, Courts were inclined to draw on the archaic absolutist and even semi-feudal vestiges of “police” as a basis for the absolute prerogative of the individual states to regulate entry by slaves and free blacks. Hence while the concept of police in Britain and on the continent became a modernizing category that integrated administrative discretion and disciplinary powers within the framework of the ordinary legal order and constitutional norms, the US police powers doctrine developed *backwards* rather than forwards, breathing new life into the otherwise discarded doctrines of the absolutist royal prerogative, and even the essentially feudal Cokean rights of colonial “discovery” and the lordly dominion of the “*parens patriae*.”⁵¹³

The Civil War and the Reconstruction Amendments eliminated the fundamental tension that the police powers doctrine attempted to resolve – whether the states or the Nation had the power to decide on the boundaries between civic inclusion and exclusion. Rather than disappearing, however, police powers jurisprudence attained an even more central role in the post Reconstruction constitutional order than it had in the antebellum period. Beginning with the

⁵¹³ For the first two examples, see *Alger*; for an example of third, see, for instance, *Fontain v. Ravenel* (1854).

Slaughter-House Cases (1873) and running all the way to the early New Deal, police powers once again articulated a form of republican dualism, and once again became a site of intense political and constitutional struggle.

While the central axis of this insider/outsider dualism was an ethnically or “culturally” defined idea of social membership – essentially, civilized Europeans versus non-European “savages – republican dualistic categories were also present even within the body of formal citizens, as we saw in the discussion of martial law and the constituent power in Rhode Island. Suffrage rights, for instance, were widely restricted *among citizens* on the basis of property qualifications, race and gender.⁵¹⁴ The basis for these exclusions was not citizenship itself – no one, for instance, disputed the fact that women before the Nineteenth Amendment were citizens, despite lacking the right to vote. Rather, the basis for these exclusions was the republican conception of independence as a crucial prerequisite for participation in self-rule. Participation in self-government required a sufficient “stake in society,” i.e. being a stakeholder by property ownership, that established self-aware, independent membership in the community. Self-government can only be entrusted, in the words of Henry Ireton, to “men freed from dependence upon others.”⁵¹⁵ Political rights could not be entrusted to those who were economically or morally dependent on another, since such dependents could easily be controlled or manipulated by another.⁵¹⁶ As Aziz Rana notes, these distinctions between “full” or active versus “passive” or dependent citizens went hand in hand with open immigration policies for Europeans possessing the capacity for active citizenship. As a result, European immigrants enjoyed suffrage rights and

⁵¹⁴ For a good overview, see Keyssar, A. and NetLibrary Inc. (2000). *The right to vote the contested history of democracy in the United States*. New York, Basic Books, 53-76.

⁵¹⁵ Quoted in Keyssar, 5.

⁵¹⁶ See, for instance, Pocock, “The Ideal of Citizenship Since Classical Times,” *Queens Quarterly* 99, no. 1 (1992); Wood, *Creation of the American Republic*, 68-70; Jacob Katz Cogan, “Note, The Look Within: Property, Capacity, and Suffrage in Nineteenth-Century America,” 107 *Yale L.J.* 473, 486 (1997)

settler land grants before naturalization, while women, blacks and other dependent citizens were excluded from such political and social rights. Formal citizenship, in fact, mattered much less than “real social membership” within the body of self-governing members of the body politic.⁵¹⁷

The fundamental distinction underlying cases such as *New York v. Miln* was not formal citizenship, but the distinction between those “civilized Europeans” on whose constant and steady migration the expansion of settler republicanism depended versus those who were held on racial, cultural or economic grounds to be ineligible for membership in the self-governing community.⁵¹⁸ Thus, slave-owning states had both the unrestricted power and “solemn duty” to protect domestic tranquility through “laws prohibiting free negroes from being introduced among slaves,”⁵¹⁹ irrespective of whether blacks were citizens in another state.

While the fourteenth amendment, by nationalizing citizenship, eliminated the fundamental problem earlier police powers theory attempted to result, the distinctions between active or “full” and passive citizenship intensified and took on renewed importance in the latter half of the 19th century. In this process, police powers remained central to the articulation and containment of this new form of republican dualism *within* the category of “formal” citizens. While the general definition of state police powers as the powers “to advance the safety,

⁵¹⁷ Rana, 115. See also Kunal Parker, “Citizenship And Immigration Law, 1800–1924: Resolutions Of Membership And Territory” in Grossberg, M. and C. Tomlins (2008). *The Cambridge History of Law in America The Long Nineteenth Century (1789-1920)*. *The Cambridge History of Law in America Ser.* New York, Cambridge University Press.

Annotation Volume II of the Cambridge History of Law in America focuses on the long nineteenth century (1789-1920). It deals with the formation and development of the American state system, the establishment and growth of systematic legal education, the spread of the legal profession, the growing density of legal institutions and their interaction with political and social action, and the development of the modern criminal justice system. We also see how law intertwines with religion, how it becomes ingrained in popular culture, and how it intersects with the worlds of the American military and of international relations. The Cambridge History of Law in America has been made possible by the generous support of the American Bar Foundation.

⁵¹⁸ *New York v. Mill*. Or as the majority in *Passenger Cases* (1849), another police powers decision from 1849 put it, “It is the cherished policy of the general government to encourage and invite Christian foreigners of our own race to seek an asylum within our borders, and to convert these waste lands into productive farms, and thus add to the wealth, population, and power of the nation.” Quoted in Cleveland, 103-4.

⁵¹⁹ *New York*, 112

happiness and prosperity of its people, and to provide for its general welfare” remained roughly the same, the underlying structure differed in important ways from the antebellum *Miln* paradigm. According to Mark Tushnet, the prevailing legal understanding in the late nineteenth century regarded civil and political rights as “baseline” rights, though not necessarily universalist ones. These rights were “available to everyone who satisfied requirements of capacity, defined in terms of the ability to deliberate and choose rationally, and independence, defined as a person’s ability to come to conclusions without being unduly influenced by another who held economic power over the person.”⁵²⁰ Hence, denial of the right to vote to women was justified by the view that women’s moral and economic dependence deprived them of the requisite capacity for enjoying full political rights.⁵²¹ Likewise, the physical and moral vulnerabilities specific to women meant that the freedom of contract of women laborers could be abridged in light of their inability to compete on equal terms with men in the free market. Unlike “baseline” civil and political rights, social rights did not enjoy constitutional protection. Recognition of social rights were in the jurisdiction of states’ discretionary police powers, but were valid insofar as they did not interfere with civil and political rights. For example, *Plessy v. Ferguson* famously held that state laws mandating racially segregated railways were valid uses of the state’s police powers, since riding in a railway car of one’s choice was merely a “social,” rather than a civil right, and therefore a matter of police discretion.⁵²²

Thus, as police powers were reformulated to articulate social and economic distinctions within a more complex and diverse society, the antebellum foundation of police in absolute sovereignty and rights of conquest over outsiders shifted to a concept of paternalist governance

⁵²⁰ Mark Tushnet, “The Rights Revolution of the Twentieth Century,” *UCLA Faculty Colloquim*, pg. 10. Available online at: <http://cdn.law.ucla.edu/SiteCollectionDocuments/fsg%20training/colloquia/ffc-tushnet.pdf>.

⁵²¹ Cogan, Keyssar, *Right to Vote*.

⁵²² *Plessy v. Ferguson* (1896).

and administration over domestic dependents. By the 1890s, the broadly discretionary foundations of state police power “conveyed” from the royal prerogative disappeared as the Court began to apply substantive due process review to state legislation, preventing states’ regulatory police powers from invading the sphere of independent, autonomous citizens and restricting regulation to the sphere of “dependents” who lacked the capacities for full citizenship. Alongside this development, the absolute and unmediated distinction between civic members and (physically) excluded aliens was replaced by a distinction between a social space free of all government regulation and intrusion, and a domain of legitimate discretionary regulation to protect “health, safety and public morality.” The former sphere was a space of self-determining “active” citizens, participating in self-government and enjoying control over the conditions of their own productive labor in an unregulated free market. The latter applied to “passive” citizens whose dependent status rendered them incapable of full enjoyment of civil and political rights, and were therefore legitimate objects of the paternalistic guidance and supervision by the state.⁵²³

Like the antebellum conception of police powers, this one also served to demarcate a domain of constitutional “normalcy,” at the same time as it distinguished a sphere of exception. The ‘norm’ referred to a social sphere of free activity that enjoyed absolute constitutional protections against regulatory interference. The boundaries of this sphere were twofold. First, the concept of “capacity” presupposed by civil and political rights distinguished between “independent,” autonomous rights-bearers, and dependent subjects requiring regulatory supervision. Secondly, the distinction between “class legislation” and activity “affected with a public interest” required that any infringement on civil or political rights must be for the sake of the population as a whole, and not single out any particular class or group over others. Thus,

⁵²³ See, for example, Pope, J. G. (1997). "Labor's Constitution of Freedom." *Yale Law Journal* 106.

even regulation of private contracts were considered valid exercises of state police powers if the private contract had third party affects, and if the regulation was in the interests of society as a whole rather than one or another contracting party. Thus, in the following examples the Court struck down state laws as illegitimate applications of the paternalist police powers to the sphere of full independent, white, male citizens.

Thus, for example in *Allgeyer v. Louisiana* (1897) the Court unanimously held that a Louisiana statute prohibiting Louisiana citizens and corporations from doing business with out of state insurance companies unconstitutionally deprives citizens of their liberty without due process of law. Justice Peckham explained that the meaning of “liberty” in the fourteenth amendment is not limited to “the right of the citizen to be free from the mere physical restraint of his person.” It extends to “the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts” on equal terms in a free market with other independent citizens.⁵²⁴ Peckham stressed that this does not deny the state “the legitimate exercise of its police” powers, but such powers may not encroach upon the sphere of independent, self-directing citizens pursuing their livelihoods in an open market.⁵²⁵ Similarly, Justice Peckham’s famous majority opinion in *Lochner v. New York* (1905) held that a New York law limiting the daily working hours of bakers exceeded the scope of legitimate police powers. The legislation amounted to “an unreasonable, unnecessary, and arbitrary interference,” depriving the bakers of their constitutional rights to freely enter into contracts and control their own labor as they see fit.⁵²⁶ In view of bakers’ full autonomy, equal intelligence and capacity for asserting their rights on par

⁵²⁴ *Allgeyer v. Louisiana* (1897), 589

⁵²⁵ *ibid.*, 591

⁵²⁶ *Lochner v. New York* (1905), 56.

with other citizens, they could “care for themselves without the protecting arm of the state, interfering with their independence of judgment and of action.” In other words, under the guise of the police powers, the New York statute was illegitimately reducing independent, white male citizens to the “dependent” status of women, children and other “wards of the state.”

While preserving this “norm” of independent, self-governing citizens in control over the conditions of their own productive labor, a series of opinions acknowledged a domain of “exceptions,” where physical, social or intellectual deficiencies made some citizens incapable of independence, and rendered them dependent “wards of the state,” in need of paternalistic state supervision. Thus, while white, male laborers and proprietors nearly always occupied the space of constitutional normalcy, Indians, women, blacks, colonized foreign populations, and even menial laborers, were held as incapable of the full independence presupposed by civil and political rights, and whose exceptional status made them legitimate objects of state paternalism.⁵²⁷ For instance, *Muller v. Oregon* (1908) upheld Oregon state legislation regulating workday hours of women. While equivalent regulations had been struck down when applied to

⁵²⁷ In a major shift from the Indian jurisprudence of the Marshall Court discussed in the previous chapter, by the 1880s Congress had asserted full jurisdiction over all Indians in US territory, and the legal framework shifted from its early modern basis in the laws of nations and imperial conquest to an explicitly paternalist framework. *United States v. Kagama* (1886), representative of this shift, upheld Congress’ competency, independent of any constitutionally enumerated source of power, to legislate and impose criminal sanctions over Indian tribes in the states or territories. Since “these Indian tribes are the wards of the nation” and “communities dependent on the United States,” Federal jurisdiction did not need a constitutional source, but the fact that such paternalistic guardianship “over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell.” Thus, from the Indians “very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power” (384). For valuable discussions, see Cleveland, 53-81; Tomlins, “Necessities of State”; Rana, 229. For the special status of women’s freedom of contract, see *Muller v. Oregon*. *Plessy* famously held that racially segregated railway cars was merely a matter of balancing social rights and did not affect civil rights: “The Object of the [Fourteenth] amendment... could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality... Laws permitting, and even requiring, their separation ... have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power... Laws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the State” (544). [and 550 defining reasonableness, the same standard adopted in *Korematsu*]. Applying extra-constitutional police powers in non-incorporated dominions, see *Downes v. Bidwell* (1901). Finally, for a very striking application of the *Muller* argument to minors, see *Holden v. Hardy* (1898).

men, legislation specifically limited to women was found to be *within* the legitimate scope of the police power. The difference from *Lochner*, according to the unanimous opinion, is that woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence ,” especially when the burdens of motherhood are upon her.” It is not only women’s inferiority to men, placing them in a permanent condition of dependency, that legitimates such exceptional paternalistic treatment. Additionally, since “healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race,” and therefore constitutes an exception to the general prohibition on police powers abridgements to the privileges and immunities of independent citizens.⁵²⁸

Strained normalcy: emergency and the breakdown of republican dualism

It’s hard not to be struck by the glaring irony about this dualistic framework that permits legislation limiting the workday hours of miners as an “exceptional” abridgment of the rights of these minors, while preventing, in the name of “normal” constitutional protections, a host of other attempts to pass child labor, workplace safety, maximum working hours and other laws as illegitimate violations of the rights of those laborers. Today, *Lochner* is more often synonymous with hostility to workers’ rights and an infamously brittle form of laissez faire ideology rather than with principled judicial opposition to the state’s attempts to curtail rights in the name of

⁵²⁸ *Muller v. Oregon* (1908), 421

security.⁵²⁹ Indeed, by making clear that any attempt to enact comprehensive labor laws at the state or national level would be struck down, the aggressive counter-majoritarianism of the *Lochner* Court effectively excluded the growing number of industrial laborers from meaningful participation in electoral politics.⁵³⁰ In this sense, the dualistic framework of police powers not only excluded a category of dependent, “passive” citizens from the sphere of unabridged civil and political life, it also functioned to exclude the class of wage laborers that had emerged in an industrialized society from meaningful participation in political life.

The basis for this exclusion was not the exceptional domain of “dependent” citizens but the juridical construction of the domain of constitutional normality. The language of “capacity” and independence underlying this constitutional normalcy has a rich history in republican “free labor” ideology, a tradition that stressed self-ownership and control over the conditions of one’s productive activity as crucial foundations for republican dignity and independence.⁵³¹ This vision of independent, self-directing citizens freely disposing of their labor without arbitrary interference or state paternalism underlay the domain of constitutional normality. This conception of “normality” that underlay the constitutional order was modeled upon a pre-industrial society of independent artisans, yeoman farmers and small proprietors. The problem was that by the turn of the century, the pre-industrial society that served as a model for the categories of constitutional normalcy had disappeared, and the application of those categories to a society shaped by mass industry and wage labor appeared inescapably arbitrary and capricious. As Morton Horowitz notes,

⁵²⁹ The significant exception that proves this rule is the rule is the school of legal scholars explicitly committed to laissez-faire principles and rolling back the welfare state, who celebrate *Lochner* in precisely these terms.

⁵³⁰ Some historians have cited this as an important factor explaining the lack of a national labor party in the US. Workers saw little reason to channel their energies into electoral politics if any legislation reflecting their demands would be invalidated by judicial review, and opted for extra-parliamentary politics instead.

⁵³¹ See Foner, *Free Soil, Free Labor, Free Men*

By representing the intellectual inquiry as one of deciding whether the challenged regulation was really within the police power and then limiting that category to standard common nuisances, judges traditionally had been able to avoid the charge that they were engaged in the political task of choosing which regulations to approve. But once the problems generated by industrial society undermined the ability of courts to continue to offer traditional definitions of the category of health, safety and morals, the inherently redistributive potential of the police power emerged with a vengeance.⁵³²

As Horowitz suggests, the Court's efforts to insist upon a categorical distinction between, say, the health of the worker and the conditions of industrial life appear increasingly flimsy and arbitrary. Hence, in order to find the workday regulations in *Lochner* to be an infringement on the free productive control of bakers over their labor, Peckham's opinion had to imagine the conditions of bakery employees in quaintly pre-industrial terms of free labor artesian and self-realization through meaningful work. Of course, the New York bakers were not independent proprietors or master artesians; they were wage laborers in brutal industrial conditions, employed in a sweat system in which owners slashed production costs by extracting as many hours as possible from laborers.⁵³³ Such conditions made the identification of productive control and meaningful work with freedom of contract nonsensical. As Rana notes, in this context "popularly enacted laws were part of efforts by laborers themselves to reclaim control over the conditions of work" rather than an imposition of paternalistic power reducing free laborers to the status of unfree dependents.⁵³⁴ And the more that this became apparent, the more the formalist construction of constitutional normalcy ceased to maintain the separation of law and politics and instead appeared as an openly and capriciously politicization of law.

⁵³² 30

⁵³³ Rana; Paul Kens, *Lochner v. New York*.

⁵³⁴ Rana, 232.

This sense of skepticism, and even outright hostility toward the pretence of an autonomous domain of law distinct from politics became a major component in the development of legal realism. Justice Oliver Wendell Holmes, an important forerunner of realism, bluntly dismissed the conceptual premises of legal formalism, noting in his *Lochner* Dissent that “general propositions do not decide concrete cases.” Holmes believed that the formalist account of legal reasoning only encouraged judges to overlook or deny the actual considerations that guided their concrete decisions. Since decisions will be guided by “social considerations” no matter what, judges who fail to recognize this “simply leave the very ground and foundation of judgments inarticulate, and often unconscious.” The *Lochner* dissent again put this more bluntly: “The 14th Amendment,” Holmes wrote, “does not enact Mr. Herbert Spencer's Social Statics.”⁵³⁵

Acknowledging the unavoidably political dimension of all judicial rulings, Holmes argued, meant that judges should be guided by two main political considerations: first, judges should take into account the “considerations of social advantage” and the policy outcomes the ruling will have upon society. Secondly, Courts should give deference to the “right of the majority to embody their opinions in law.”⁵³⁶ Holmes argued that in cases where the “dominant public opinions” are clear on a certain policy, abstract judicial axioms should give way to the preferences represented by the legislature, within broad limits. Those limits cannot be stated axiomatically and categorically, but are defined by when “a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.”⁵³⁷ Developed primarily in dissents, this view of judicial deference guided by public opinion and policy considerations and limited by the “reasonable man” standard became an important basis for legal realism.

⁵³⁵ *Lochner*.

⁵³⁶ *Ibid.*

⁵³⁷ “*Lochner*,” dissent.

In addition to the doctrine of legislative deference, Holmes provided a second legal realist basis for overcoming the rigid categories of formalism: expanded administrative powers in an “emergency.” Unlike the legislative deference doctrine, which was confined to Holmes’ dissenting opinions like *Lochner*, Holmes’ emergency framework was set out in a series of opinions during WWI in which a majority of Justices joined Holmes. These cases mark an important departure from the dualist paradigms of both martial law and police powers and, while they relied upon the crucial backdrop of a declared state of war, they eschew the rigidly dualist categories of a spatialized state of exception defined by the categorical distinctions of police powers and martial law. Instead these cases suggest a flexible framework of constitutional powers over *society as a whole* that expands or contracts in scope depending on the severity of the external emergency. In contrast to the categorical criteria defining the suspension of habeas corpus, or the legitimate domain of police powers, Holmes makes not pretence to define in advance the formal criteria of an emergency. is left crucially undefined in advance. Thus, *Wilson v. New*, for example, upheld temporary legislation to fix hour and wage guarantees to prevent a general strike by railway workers during World War I.⁵³⁸ The Court rejected the railway companies’ argument, based upon the older martial law paradigm, that

the situation was one of emergency, and that emergency cannot be made the source of power (citing *Ex parte Milligan*).The proposition begs the question, since, although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed.⁵³⁹

The “emergency,” in other words, cannot create any wholly new powers apart from the powers

⁵³⁸ *Wilson v. New* (1917). In this case Holmes joined the majority decision written by Chief Justice White.

⁵³⁹ *Wilson v. New*, 348. See also *Block v. Hirsh* (1921),

to regulate interstate commerce that already exist. But the special emergency circumstances – the paralysis of the national railway networks during wartime – do alter the scope of the legitimate means implied by the existing regulatory powers. The emergency conditions have temporarily given the private contractual relations in the railroad industry an aspect of a “public business,” subject to national regulation in the public interest.⁵⁴⁰ Unlike the martial law paradigm, then, this emergency doctrine does not rest on the bright line, per se rules prescribed by the conditions of effective sovereignty, and it does not permit powers that would be categorically proscribed within those boundaries. It refers to the shifting scope of ordinarily existing constitutional powers, and defines the boundaries of the means implied by those powers by reference to the extraordinary conditions that change the conditions of their exercise. A further consequence of the emergency doctrine is that it emphasizes the provisional, temporary nature character of the increased scope: once the emergency has passed, the powers involved contract to their ordinary scope. As the majority repeatedly stresses in *Wilson v. New*, the wage fixing legislation was temporary, not permanent.⁵⁴¹

II. Police, Emergencies and the New Deal: Creating a New Emergency Doctrine, 1934-1937

We now turn to the creation of a new theory of emergency powers that emerged from the intensely conflictual politics of the early New Deal. It may seem odd to focus attention on this period from the perspective of emergency powers. We often think of New Deal constitutional politics from the perspective of federalism, or the regulatory powers of Congress, or, from the influential work of Bruce Ackerman, as an instance of democratic constitution making and extra-

⁵⁴⁰ 347

⁵⁴¹ The fixing of the wage standard was “not permanent, but temporary, leaving the employers and employees free as to the subject of wages to govern their relations by their own agreements after the specified time,” 345-6. And again, “This was not a permanent fixing, but, in the nature of things, a temporary one which left the will of the employers and employees to control at the end of the period if their dispute had then ceased,” 357-8.

legal constitutional change. It appears infrequently, if at all, in recent constitutional scholarship of emergency powers.⁵⁴² This is unsurprising, since many of the fundamental issues at the fore of contemporary emergency powers – such as executive war powers, military tribunals and detention, freedom of speech – are entirely absent from the New Deal context. Inversely, many of the most prominent constitutional conflicts of the New Deal period – the administrative powers of the Federal government, contract abridgment, delegation to administrative bureaucracies and the like – appear as elements of ordinary, long term, normal politics, appearing in debates over the scope of constitutional *normalcy*, without reference to any exceptional, emergency conditions.

Nevertheless, scholars interested in constitutional emergency powers have much to gain from analyzing New Deal constitutional politics as emergency powers. The centrality of the framework of emergency powers in the constitutional politics of this period was recognized, and fiercely contested, by observers at the time. More importantly, the emergency powers debates from this period is important for our purposes, because from them we can see the creation of a genuinely novel doctrine of emergency powers that integrates Holmes tentative suggestions during WWI together with the category of police powers as it had developed in the *Lochner* constitutional order. This new doctrine of emergency powers marks a critical departure from the theme of *republican dualism* that has characterized the various examples of emergencies and states of exception we have been discussion above and in chapter four. The framework of “police” emergencies was detached from any explicit reference to war, sovereignty or dualistic conceptions of citizenship, and became a vehicle for integrated a new, inclusive and non-dualistic politics into the constitutional order. While the emergency doctrine, on the one hand,

⁵⁴² This is not true of the classic discussions of emergency powers from the 1940s and 50s, such as Rossiter, Corwin and Friedrich, for evident reasons of historical proximity. A few contemporary exceptions: ...

was a part of the fundamental achievement of overcoming the theme of exclusive republican dualism, at the same time it helped to lay the foundations for a more flexible, expansive and difficult to limit framework of emergency powers that has characterized emergency powers in the US in the late twentieth and early twenty first centuries.

Police Powers and the Road to Blasdell

In its initial New Deal decisions, the Court upheld a number of limited programs, but it chose not to do so on the grounds of deference outlined by Holmes. Instead, it chose the more ambiguous path of reinterpreting the category of emergency powers, and reapplying it from conditions of war to an economic emergency. Adopting the deference doctrine in 1933 would have allowed the Court to uphold the New Deal experiments while avoiding the problem of unconstitutionality and the task of shifting the scope of emergency powers to include economic emergencies. Further, it would have framed the New Deal programs in a substantially different light, as a reflection of the legitimate will of the democratic majority to transform the relationship between the state and society, not as a temporary extraordinary measure to restore the status quo, but as the future-oriented decision taken in a representative democracy.

Recall the previous discussion of the three potential stances the Court could adopt toward the New Deal: categorical rejection, deference to public opinion, or the emergency doctrine. From the outset, the only safe prediction was that deference was unlikely. But it was far from clear at the outset that any accommodation would be made, or that a redefinition of emergency powers would be the means of doing so. The possibility of explicitly treating the Great Depression as an emergency analogous to war first emerged in a 1932 dissent in a case involving an Oklahoma

state law regulating the ice business. The majority, unaffected by the extraordinary conditions and reasoning along familiar *Lochner* lines, struck down the law as a violation of substantive due process. Justice Brandeis' dissent, however, gives a clearer sign of the choices and possibilities facing the Court in the years to come. Brandeis' first argument retreads the familiar lines of Holmes' deference doctrine we saw earlier, protesting against the Court's adherence to outdated categorical rules that constrict the state's police power to the artificially narrow realm of nuisance abatement.⁵⁴³

The dissent also includes a second, much shorter argument that, unlike the first, recasts this older debate in new terms. Near the end of the dissent, Brandeis states that

The people of the United States are now confronted with an emergency more serious than war. Misery is widespread, in a time, not of scarcity, but of overabundance. The long-continued depression has brought unprecedented unemployment, a catastrophic fall in commodity prices, and a volume of economic losses which threatens our financial institutions. Some people believe that the existing conditions threaten even the stability of the capitalistic system.⁵⁴⁴

In this context, Brandeis cites rent control cases from World War I, which – significantly – were emergency measures during wartime but involved only domestic regulatory and police powers, without any direct relation to the war powers themselves.⁵⁴⁵ The suggestion is clear: the Court should treat the catastrophic insecurity of US society analogously to emergency powers in wartime, authorizing extraordinary measures that would require stricter scrutiny in less dire

⁵⁴³ *New State Ice Co.*, dissent, 302. Substantive, categorical limitations to the police power, such as the majority's distinction between a private business and a business affected with a public interest, are arbitrary and “rest on a historical error.” The proper object of regulatory police powers is the social body as a whole, and are subject only to the pragmatic “reasonable man” test proposed by Holmes.

⁵⁴⁴ *Ibid.*, 306-7.

⁵⁴⁵ 306, citing *Marcus Brown Holding Co. v. Feldman* (1921) and *Block v. Hirsh* (1921).

circumstances. The analogy is left unexplored, however, leaving it unclear whether Brandeis intended emergency powers as an alternative justification or as an additional, incidental support for the longstanding argument for deference.

By 1934, Brandeis' emergency analogy migrated from an isolated dissent to a new majority coalition of progressives and moderate conservatives led by Chief Justice Hughes.⁵⁴⁶ Hughes adopted the emergency doctrine as his own, expanding it from an unexplored suggestion to a bold new framework that synthesized emergency and police powers together for the first time into a single doctrine. *Blaisdell* concerned state legislation attempting to prevent foreclosures, an issue in which popular outrage was especially acute. Threatened by a devastating wave of foreclosures, Minnesota farmers rioted in rural areas of the state before descending on the state capital demanding a means of saving their farms from bankers. The state's governor, a liberal New Dealer impatient with the slow pace of reform, announced "I shall declare martial law. A lot of people who are now fighting the [relief] measures because they happen to possess considerable wealth will be brought in by the provost guard. They will be obliged to give up more than they are giving up now."⁵⁴⁷ The actual response was less drastic: the Minnesota legislature passed a mortgage relief law extending the dates of redemption beyond the dates specified in individual mortgage contracts. Making explicit reference to the crisis, the law was made to expire in March 1935 or after the depression lifted, whichever came first. The Minnesota State Supreme Court had upheld the legislation; after a long empirical discussion of

⁵⁴⁶ In the period between 1934 and 1937, the justices can be roughly broken down into three groups: the three "progressive" coalition of Brandeis, Stone, Cardozo; the "conservative" coalition of Sutherland, Van Devanter, McReynolds and Butler; and the "centrists" of Hughes and Roberts.

⁵⁴⁷ quoted in Hulsebosch, 1988.

the gravity of the economic emergency, it concluded that the depression was severe enough to “call[] for the exercise of the police power to grant relief.”⁵⁴⁸

The Supreme Court, adopting the state court’s emergency rationale, upheld the law. Hughes’ majority opinion refines the more general association of an emergency with state necessity into a new framework, which I will call the emergency doctrine, sanctioning the expansion of police and regulatory powers into domains of contractual liberty as temporary emergency responses to a condition of extreme insecurity and social disorder. In a frequently quoted passage Hughes asserts that the constitutionality of the state’s police power to alter contracts during a state of emergency hinges on “the relation of emergency to constitutional power.”

Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. [Yet] While emergency does not create power, emergency may furnish the occasion for the exercise of power.⁵⁴⁹

As we saw in *Wilson v. New*, doctrine of constitutional continuity between normal and exceptional powers contrasts sharply with the martial law paradigm analyzed in the previous chapter. For the older paradigm, martial law was not an augmentation or expansion of any ordinary constitutional power. It was “not law proper” but a “law of necessity,” permissible only when the conditions of internal sovereignty that made constitutional powers possible in the first place had broken down. The relationship between martial law and war was direct and immediate. The “right” to use force in war and in martial law derived from the rights of self-preservation

⁵⁴⁸ State Court Majority, quoted in SC majority, 420

⁵⁴⁹ *ibid.*, 425-7

that inhered in sovereignty, rather than from any delegated constitutional power. Also like war, martial law was an explicit departure from the crime paradigm and its attendant constitutional rights. Further, the departure was justified by the extraordinary non-justiciable nature of both circumstances: in war, because there was no superior tribunal between two sovereigns, and in martial law because the legitimate, constituted tribunals are incapable of functioning.

The emergency doctrine from *Wilson v. New* and other WWI cases departed from this pattern. But while these cases referred to delegated, ordinary constitutional powers, the expansion of regulatory powers into *emergency* powers critically depended on the fact of ongoing war. The existence of declared war, and therefore the relevance of the sovereign right of self-preservation that war implied, was the basis for the Court's judgment that rent control or railroad working conditions were temporarily and exceptionally "afflicted with the public interest." In martial law, the relevance of sovereignty and the war paradigm was immediate. In the WWI emergency doctrine, it was one step removed, mediated by the enumerated constitutional source of the regulatory emergency powers. But reference to war and sovereign self-preservation were still necessary and essential for the ordinary/emergency, normal/exceptional distinction.

This is the novelty of Justice Hughes' majority opinion in *Blaisdell*. For the first time, the sovereign right of self-preservation that served as the foundation of all previous justifications of emergency powers has disappeared. Emergency powers, after *Blaisdell*, may be based *exclusively* on enumerated constitutional powers and the police power alone. This shift has fundamental implications for the *source* of emergency powers and their legitimate object (1), for the definition of the emergency conditions that *justify* emergency powers (2), and for the *limitations* imposed on emergency powers (3).

(1) Source and object: police power as the sovereign right to ensure social security

The distinction between the regulatory powers enumerated in the constitution and the police power is extremely important to the new emergency doctrine. Police power, as we have seen, retains in the common law an implicit reference to the rights that inhere in sovereignty – *not* the rights of self-defense, but the rights of regulation and prospective “household management.”

Uncoupled from war, emergency powers will now be founded upon the non-enumerated rights of sovereignty implied in the police powers to ensure the security and welfare of society as a whole.

The core of Hughes’ opinion rests on the sovereign rights of the state’s police power to ensure safety and security for the social order.⁵⁵⁰ In addition to retaining the power to modify remedies for the enforcement of contracts,

the State also continues to possess authority to safeguard the vital interests of its people... the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worthwhile -- a government which retains adequate authority to secure the peace and good order of society.⁵⁵¹

In other words, the state’s police power, like the right of self-preservation of the war paradigm, is not an exclusively enumerated power; it also derives from the prerequisites of sovereignty itself, as a necessary condition of possibility of all constitutionally enumerated powers. Hence, analogizing from eminent domain, Hughes argues that this “necessary authority of the state” to modify contracts if the wellbeing of society requires it is implicitly and necessarily a part of

⁵⁵⁰ *Home Building and Loan Association v. Blaisdell* (1934), 430.

⁵⁵¹ *Ibid.*, 434-5.

every contract.⁵⁵² As a precondition for all contractual activity, the state's "continuing and dominant protective power" over society necessarily has priority over the terms of any particular contract that interferes with this power. This "necessary precondition" justification is in fact structurally identical to the justification we saw earlier for martial law, following from the necessary condition of the state's right to self-preservation. The necessary condition in this case, however, is not the independence and physical integrity of the state and its sovereignty vis-à-vis other states but the government's ability to maintain "peace and good order of society," on which all contractual relations depend.

(2) *nature of the emergency*

While police powers and earlier martial law share this basis in non-enumerated attributes of sovereignty, only martial law was a form of emergency power. Unlike the decidedly extraordinary and circumscribed events like invasion or insurrection, the police powers to maintain security and good social order in the precedents cited by Hughes are a continual and ongoing part of governance, an *ordinary* rather than emergency power. Hence, rather than drawing clear and bright lines around them, Hughes stresses the need to "harmonize" the constitutional rights embodied in the prohibitions of the contract clause with "the *necessary residuum of state power*" expressed through the police powers to ensure society's security and welfare.⁵⁵³ How can police powers become the basis of explicitly *emergency* powers?

⁵⁵² Citing *Long Island Water Supply Co. v. Brooklyn* (1897), "But into all contracts, whether made between States and individuals, or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the preexisting and higher authority of the laws of nature, of nations or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur," *ibid.*, 435-6.

⁵⁵³ *Ibid.*, 435, my italics.

As always, the definition of the emergency is never independent of the particular conception of “normality” in question. We’ve seen how by the late 19th century the only legitimate interference with freedom of property and contract under the police powers required the motive and direct effect of regulating the public morals, health or safety of society.⁵⁵⁴ The Court struck down numerous attempts at social legislation – as in the case of *Lochner* itself – as “under pretence of regulation” and not “real” exercises of the police power.⁵⁵⁵ Only these narrow categories were thought to fall outside the blanket prohibition of the contract clause.

Hughes responds by shifting the question from the narrow, per se categories of legitimate police activity to the conditions under which interference with contracts is nevertheless “consistent with the spirit and purpose” of contractual rights. The question, he argues, is not whether a regulation is “really” about morality, health or safety irrespective of the circumstances. The question is whether the interference is actually required by the degree of danger to public welfare and safety. In other words, the scope of the police power cannot be fixed abstractly beforehand within narrow categories. The boundaries of the state’s reserve power to protect the community, Hughes argues, fluctuate, sometimes radically, depending on the changing external conditions and dangers. Emergency conditions, in other words, authorize emergency police powers that would be unconstitutional in ordinary times. The insecurity created by the economic emergency transformed broader than ordinary measures, including a temporary modification of mortgage contracts, into constitutionally authorized forms of regulation for the duration of the emergency. Police powers became emergency powers

⁵⁵⁴ See Thomas Cooley, *Constitutional Limitations* and Christopher Tiedemann, *A Treatise on the Limitations of Police Power in the United States* (1886) both in *American Legal History* ed. Hall, Finkelman, Ely.

⁵⁵⁵ *Lochner*. In *Blaiswell*, the dissent argued along these lines: the fact that the Minnesota statute was temporary and for a public purpose, did not make it a legitimate use of the police powers, because it was not directly for the sake of public morals, health or safety, 439.

Blaisdell's context-bound approach rejected the determination of clear, black-and-white rules about what constitutes an emergency and what doesn't. The flexibility of the model suggested a sliding-scale, case-by-case test in which "normal" and "emergency" conditions would at best represent two poles on a spectrum rather than a threshold separating normal and emergency conditions. Along these lines, the opinion observes that the growth of social and economic complexity have magnified the importance of protecting "the organization of society" and "the economic structure" as a vital public interest. These transformations have made the social and economic order "upon which the good of all depends" into a legitimate object "of the essential reserved power of the States to protect the security of their peoples."⁵⁵⁶

At the same time, however, the opinion insists that the power to modify contracts is not an ordinary but a temporary *emergency* power brought on by exceptional conditions. Hughes analogizes the needs of society in "a great public calamity" such as an earthquake or flood to the "urgent public need demanding such relief [that] is produced by other and economic causes."⁵⁵⁷ He also cites the WWI emergency cases as removing "whatever doubt there may have been" that during an emergency the state may modify contracts. These analogies suggest less of a sliding scale than a categorical distinction between norm and exception, between temporary emergency infringement and normal contractual rights, even though his context-bound framework has undermined the basis of such a categorical distinction.

(3) limitations on emergency powers

Hughes does not acknowledge this tension between the "exceptional" analogies of war and natural catastrophe and the more ordinary means of regulating a complex modern economy.

⁵⁵⁶ Ibid., 442-3.

⁵⁵⁷ Ibid., 440.

Without entering into specifics, he concludes that economic conditions were sufficiently disrupted that “an emergency existed in Minnesota,” justifying the *temporary* measures taken in the statute.⁵⁵⁸ Despite the incongruities, here we can see a clear advantage to casting enhanced regulatory powers on the emergency powers model. Temporary emergency powers, unlike longstanding and forward looking reforms, are authorized only for the sake of restoring the constitutional status quo, and expire once the emergency is past.

Hughes stresses three important forms of limitation on the new emergency powers. First, even without providing bright-line criteria for what constitutes an emergency, Hughes is careful to stress that the claim that an emergency exists will be subject to continual scrutiny by the Court: “It is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends.”⁵⁵⁹ Despite the flexible continuum of constitutional powers, the notion of emergency still seems to imply a binary status. Secondly, the emergency doctrine imposes strict time limitations, ensuring that emergency expansions of the police power do not substitute themselves for a new norm. Hughes makes clear that the Minnesota statute could be upheld because of its *temporary* and provisional nature, expiring either in 1935, or after the cessation of the economic emergency, whichever came first. Once again, clear limits are asserted without clarifying what those limits are and how they can be ascertained. Third, Hughes emphasizes substantive limits as well, derived from the Court’s task of “harmonizing” the fluctuating reserve power of the state with the constitutional limitation of the power. This means that the reserve power cannot be construed to destroy the limitation; any temporary adjustment of the limitation must be consistent with its “spirit and purpose,” and narrowly tailored to its

⁵⁵⁸ Ibid., 444.

⁵⁵⁹ Ibid., 442

legitimate end of protecting society.⁵⁶⁰ Here too, the apparent continuity with the *Lochner* constitutional order belies deeper ambiguities. The “spirit and purpose” of the previous limits were to designate an economic space of private liberty, protected from state regulation. But if that economic space of normalcy is at the same time, as Hughes asserts, regarded as dependent on the “continual protective power” of the state, then the spirit and purpose of the limitations cannot be regarded as external to police power itself.

Despite these deeper ambiguities, Hughes’ majority opinion in *W.B. Worthen v. Thomas*, released two months after *Blaisdell*, provided an opportunity to demonstrate that the emergency doctrine could be grounds for overturning as well as upholding state reforms. Striking down an Arkansas law exempting insurance awards, Hughes explained that unlike the Minnesota mortgage law, the insurance legislation was “not limited to the emergency and set up no conditions apposite to emergency relief.”⁵⁶¹ In other words, relief legislation must explicitly conform to the emergency doctrine and announce its temporary and provisional status. In the same period, the majority once again upheld a New York State milk industry regulation as a valid exercise of the state’s police powers to prevent disorder in the economic system and the community at large.

The emergency powers strategy in *Blaisdell* and *Worthen* both split the previous conservative majority on 5-4 lines. The incredulous objections of the *Blaisdell* dissent make clear just how novel the majority’s reformulation of the emergency doctrine through police powers appeared. Rejecting the majorities attempt to uncouple emergency powers from their traditional

⁵⁶⁰ Hence, the police power of Minnesota *can* temporarily delay foreclosure dates (altering the remedies of the contract in order to meet an urgent social need), but it could not permanently prevent foreclosure, or forgive the remainder of the debt owed (abolishing the remedy altogether, or altering the obligations of the contract). *Ibid.*, 439.

⁵⁶¹ *W.B. Worthen v. Thomas*, quoted in “New Deal,” 1991.

locus in the martial law paradigm, the dissent flatly denied that an economic crisis, however severe, constitutes an 'emergency' in any way analogous to "the emergency of war" in accordance with the martial law paradigm. Economic and social misery, Sutherland argues, may be described as an emergency, but that changes nothing whatsoever about the categorical prohibitions imposed by the constitution on state action. The contract clause "does not contemplate that an emergency shall furnish an occasion for softening the restriction or making it any the less a restriction upon state action in that contingency than it is under strictly normal conditions".⁵⁶² In both cases the dissents cited *Milligan*, emphasizing the rigid boundaries of the martial law paradigm to reject *Blaisdell*'s analogy to "peace and good order of society."⁵⁶³ In a lucid passage, the dissent honed in on the failure of the new emergency doctrine to provide criteria for what constituted an emergency of public security:

What circumstances give force to an "emergency" statute? In how much of the State must they obtain? Everywhere, or will a single county suffice? How many farmers must have been impoverished or threatened violence to create a crisis of sufficient gravity? If, three days after this act became effective, another "very grievous murrain" had descended, and half of the cattle had died, would the emergency then have ended, also, the prescribed rates? ... To these questions, we have no answers. When emergency gives potency, its subsidence must disempower; but no test for its presence or absence has been offered.⁵⁶⁴

In one sense, *Blaisdell*'s reformulation of the emergency doctrine prevailed over the conservative dissent in that it successfully establishes the terms with which the Court will engage with the

⁵⁶² Sutherland Dissent, *Blaisdell*, 473

⁵⁶³ "The exigency is of the kind which inevitably arises when one set of men continue to produce more than all others can buy. The distressing result to the producer followed his ill-advised, but voluntary, efforts. Similar situations occur in almost every business. If here we have an emergency sufficient to empower the Legislature to fix sales prices, then, whenever there is too much or too little of an essential thing -- whether of milk or grain or pork or coal or shoes or clothes -- constitutional provisions may be declared inoperative, and the "anarchy and despotism" prefigured in *Milligan's* case are at the door," *ibid.*, 551.

⁵⁶⁴ *Ibid.*, 548.

constitutional questions raised by the New Deal programs. In another respect, however, Hughes struggled for the next four years to provide satisfactory answers to the questions raised by the *Worthens* dissent. The fact that the doctrine provided a basis for striking down legislation as well as upholding it was clear testimony to Hughes conviction that clear limits existed. But it fell short of satisfying the demand for a generalizable test for determining the presence or absence of an emergency. The problem of identifying criteria for a domestic economic emergency would be resolved, in 1937, by giving the search altogether, along with the idea of a return to a still valid status quo ante. Just as we saw in the previous chapter how the martial law paradigm was transformed during Reconstruction in an ambivalent attempt to enact permanent constitutional change under the guise of storing the constitutional status quo, here too we shall see the processes of informal constitutional transformation mediated through a putatively “conservative” doctrine of emergency powers.

Which status quo? A new emergency and a new norm

Recall, then, the three basic options facing the Court in 1934. The first option would have been to follow the path set out in the dissents, cling to *Lochner* principles, and categorically invalidate down all attempts to reform the existent laissez faire structure relating state and society.

Secondly, it could have abandoned *Lochner* and taken up Holmesian deference, engaging with the regulatory programs as a series of legitimate democratic decisions on fundamental reforms for the future. These options present a radically forced choice between judicial deference that abandoned the premises of the *Lochner* era, or a judicial obstruction in the face of overwhelming popular majorities and the real possibility of a breakdown of social order. It’s not hard to see why the Court would be keen to avoid this forced choice by instead effectively declaring an

“emergency” in the security and welfare of society, and casting the reformist legislation as a new species of emergency powers deriving from the sovereign protective power over society. This strategy, and Hughes new doctrine of emergency powers accomplished a three-fold goal. First, it was able to avoid adopting a categorically obstructionist position, which would have been catastrophic for its own legitimacy if not for the country as a whole. Secondly, it could accommodate *some* of the new reforms as temporary exceptional measures while simultaneously affirming the integrity of the status quo ante. Finally, it reserved for itself the authority to decide the scope and extent of the new powers, preserving its own power to shape the outcomes even as it masked its own partial retreat.

At this point, we can again refer to Bruce Ackerman’s account of constitutional change as an informal procedural instantiation of the democratic constituent power as a useful contrast to the account I am suggesting here. My account converges with Ackerman’s in interpreting the New Deal, like Reconstruction, as an informal constitutional transformation located between the two poles of legal continuity and revolutionary rupture. While Ackerman argues that these instances of constitutional change evinced an unambiguously democratic character, the focus here on emergency powers as a means of reorienting the identity of the constitutional to be restored suggests that the democratic elements celebrated by Ackerman coexisted with an account of emergency powers that was distinct from, and even in opposition to Ackerman’s theme of popular sovereignty. My claim here is not at all that the emergency and police powers doctrines were somehow definitive of the broader public meaning of New Deal constitutionalism. Rather, focusing on the role of emergency and police powers in the construction of the post-New Deal constitutional order qualifies rather than negates Ackerman’s account. First, the extent to which democratic constitutional change was accomplished through formally non-democratic categories

of emergency powers is a reminder that even with Ackerman's multistep process of constitutional politics the sovereign will of We the People is always a more or less fluid and protean basis of legitimacy, not a concrete political agent capable of representing itself. Secondly, highlighting the role of emergency powers in informal constitutional change provides a striking illustration of the way in which the categories of norm and exception can become an arena for political contestation and redefinitions which subsequently become embedded, lose their contested status and shape new forms of emergency politics that had little to do with the original redefinition. We can get a clearer sense of the contested status of the new emergency doctrine by looking at the way it was interpreted outside the Court.

While the new emergency doctrine was welcomed generally by progressives eager for the reforms to move ahead, some greeted the new emergency doctrine with enthusiasm, while others questioned whether the doctrine provided sufficiently solid constitutional grounds for the new regulations.⁵⁶⁵ In an extremely incisive 1934 analysis, Jane Perry Clark noted the judiciary's hostility to the deep institutional reforms proposed in recent years. "If," however, "changes in the economic and legal structure of the country are based on the existence of a widespread emergency, these frightened verbalists may be soothed by the implication of a mere temporary aberration from the sacred tablets of the law."⁵⁶⁶ For Clark, the evasiveness and arbitrary quality of the "dubious emergency doctrine" – in which the Court has been satisfied that an emergency exists in some circumstances, and denied its existence in others without reference to any fixed set of criteria in either case – is not accidental but structural. Since "the [emergency] doctrine is of necessity vague and amorphous," Clark expresses his hope that the Court will drop the fiction of

⁵⁶⁵ For an excellent discussion, see Murphy, P. L. (1971). *The Constitution in crisis times, 1918-1969*. New York,, Harper & Row; Belknap, "The New Deal and the Emergency Powers Doctrine" and Hulsebosch, "The New Deal Court: Emergence of a New Reason." See also, Scheiber, "Property Rights versus 'Public Necessity.'"

⁵⁶⁶ Clark, 268.

a temporary emergency altogether and affirm the programs for what they are: forward looking, legitimate “experimentation[s] in economic control by government” in response to urgent problems stemming from the ordinary conditions of industrial capitalism.⁵⁶⁷ Clark’s critique echoed the discomfort of other more radical progressives with the framework of “emergency powers” invoked by the New Deal. Pointedly referring to the Depression as a “crisis” rather than an “emergency,” John Dewey noted the propensity of the “emergency” framework to obscure the fundamental political questions about democratic participation raised by the reformist agenda. The “emergency” framework, Dewey noted, only prepares for quickly resurrecting oligarchic privileges, under the guise of a “return to normalcy.”⁵⁶⁸

Roosevelt’s measures were fine in an emergency; we gladly and patriotically supported them. But the emergency has passed. Government must now take its hands off business and allow the innate energy and wisdom of the leaders of business to conduct their affairs in their own wise and successful way – the truly “American” way. The plea will of course be tremendously reinforced by the officially temporary character of the methods... [President Roosevelt] can, if he chooses, claim credit for the temporary nature of the emergency measures and take the lead in declaring that now they have been so successful that they have accomplished their purpose.⁵⁶⁹

Many others, however, were enthusiastic about the doctrine, sometimes for contradictory reasons. Moderate conservatives endorsed it as a way to accommodate some of the reforms while retaining judicial control over the process and refusing sanction to any permanent constitutional

⁵⁶⁷ 282-3.

⁵⁶⁸ Dewey, “Imperative Need: a New Radical Party,” in *John Dewey: the Later Works*, vol. 9, 78 (quotation marks in the original).

⁵⁶⁹ Ibid. elsewhere, Dewey shrewdly responded to the Emergency that the situation called for comprehensive reform, and that “making the President a banking dictator in a crisis is not a solution – it is merely a postponement of the inevitable remaking of our profiteering banking system.” Dewey, “The Banking Crisis,” vol. 9, 255.

change.⁵⁷⁰ But many progressives also celebrated the new emergency powers for exactly the opposite reason, as heralding a new age of constitutional flexibility and pragmatism. Writing shortly after *Blaisdell*, John Fitzsimmons praised the radical constitutional shift entailed by the new emergency doctrine and emphasized its unprecedented novelty in the realm of police powers, contrasting the “classic coldness” of the old paradigm with the “humanism” of Hughes’ flexible emergency powers.⁵⁷¹ In a final flourish, he predicts that the Constitution, reinvigorated by the new emergency doctrine, will enjoy a “fresh and green old age” comparable to Virgil’s description of the Roman gods.⁵⁷²

One of the most interesting accounts of *Blaisdell*’s significance for informal constitutional change was published in the same year by John Dunham. Dunham, the executive editor of the *Commercial Law Journal* and a legal progressive, went even further than Fitzsimmons in hailing a new emergency constitution. Dunham argued that the flexibility of the new emergency doctrine provided a means of recognizing that “[i]ndividual right and individual justice give way to the demands of social justice, and precedent may become merely persuasive instead of controlling,” while at the same time avoiding outright constitutional rupture.⁵⁷³ By expanding emergency powers to the police power, the Court reversed the priority of individual liberty of contract over security, and elevated the security of society to the level of a constitutional principle. According to Dunham, the decision endorsed the principle that “when a

⁵⁷⁰ First example, Parker, “Is the Constitution Passing?”; Handler, “The National Industrial Recovery Administration,” *American Bar Association Journal* 19 (1933).

⁵⁷¹ Fitzsimmons, “Constitutionality of Emergency Legislation,” *Kansas City Law Review* 2 (1934): 72-3.

⁵⁷² 75.

⁵⁷³ John Dunham, “The New Philosophy,” *Commercial Law Journal* 29 (1934): 179-80.

statute enlarges the security of the masses, even though at the expense of the few, it should not be held repugnant to the constitution as depriving the few of any liberty or right.”⁵⁷⁴

For Dunham, the flexibility and expansiveness of the new emergency doctrine is its most promising feature, allowing constitutional change through the judiciary to an extent that may make Article Five and formal constitutional amendments superfluous. The framework of emergencies allows the Court to detect in the constitution hidden reservoirs of inherent power

which may spring into action or be resurrected when occasion requires. An emergency creates use for the power, which, though never employed before, is actually contained in the constitution. With this theory, *amendments become practically unnecessary*, and our legislatures possess a broad power which may be sustained by the courts of last resort...⁵⁷⁵

In his enthusiasm, Dunham doesn't appear to take notice of the contradiction pointed out by Clark: the purpose of the emergency doctrine was the exact opposite of a de facto constitutional amendment. It emphasized the temporary and provisional character of the new legislation, and affirmed the continuing validity of the old constitutional order. This, indeed, was almost certainly why Hughes chose the emergency doctrine in the first place over Brandeis' more straightforwardly progressivist, deferential framework.

In the short term, Dunham's hopes for the emergency doctrine were almost surely disappointed, at least in the period between 1934 and 1937. From a broader horizon of constitutional development, however, he was remarkably prescient. His analysis contained a

⁵⁷⁴ 180. More ominously, speaking of the duty of the Courts to restore the feeling of “in the mind of the common man” in order to “silence the rumblings and allay the fears created by the agitator... Those who destroy the confidence of our people, who shake the faith of the common man in the safety of our institutions, and in the stability and justice of our courts, are no less traitors than they who aid the enemy in war,” 180.

⁵⁷⁵ Dunham, 182. My italics

penetrating insight about the long-term implications of the emergency doctrine that would only become fully apparent after 1937. Dunham saw clearly that the emergency doctrine's derivation of extraordinary emergency powers from ordinary constitutional sources, and its inability to provide any criteria for the emergency conditions that amplify those powers, effectively relativized any fixed distinction between a temporary exception and a permanent normality. In effect, his enthusiasm and the conservatives' anathema shared the same source: once emancipated from its confines in the war paradigm, emergency powers for the sake of security are resistant to any fixed set of limitations, and in principle amount to substantive constitutional transformation *within* formal constitutional continuity.

In addition to the analyses of Dunham and other interpreters in 1934, we can point to a further radical implication of *Blaisdell*'s emergency doctrine, which may not have been apparent to contemporaries. Identifying social and economic insecurity as an emergency capable of shifting the scope of constitutional powers and rights may have been motivated by an earnest desire to use emergency powers to return to the *Lochner* status quo as quickly as possible. Nevertheless, such a structure was at the same time logically consistent with using emergency powers to abandon the *Lochner* status quo ante for good. The reason is that for the *Lochner* status quo, economic emergencies are part of constitutional *normality*; they cannot create or expand any powers that do not exist ordinarily as well. A *Blaisdell* emergency is already a norm under *Lochner*; there is nothing to restore. The new forms of emergency powers *Blaisdell* called forth, therefore, could no longer be contained as means to the end of returning the status quo ante. From the perspective of the status quo ante, there was no emergency and the expanded police powers were unconstitutional. From the perspective of the new emergency powers, "returning" to the status quo ante would not signify an end to the emergency; the only

meaningful end for the new emergency powers would be to secure a *new* norm, not the old one. The Court's recognition of insecurity as an emergency was already, if only implicitly, a rupture with the status quo they wished to uphold.

In 1934, the rupture was only latent, and understandably it did not appear obvious to most observers. If economic prosperity had returned that year, it is likely that the contradiction would have remained at the level of an abstract logical possibility.⁵⁷⁶ Instead, the economic emergency intensified, as did the popular determination to use the national government to alleviate its worst effects and overcome it. For the next three years, the Court attempted, with increasing strain, to maintain the emergency doctrine as a model of "commissarial dictatorship" – a temporary, limited means to return to the status quo ante. By the 1937 switch in time, however, Dunham's vision prevailed, in a two-fold respect. First, as Bruce Ackerman has argued, the decisions amounted to the culmination of an informal amendment process, synthesizing the new "emergency" regulatory powers as permanent features of the new constitutional order. Secondly, in contrast to Ackerman's democratic interpretation of the process, the 1937 opinions *maintained* the source of authority for the new regulative powers provided by the emergency doctrine. The difference was that the "switch" cases simply abandoned the emergency doctrine's unsuccessful attempts to maintain consistent limitations of time and scope on the emergency powers. The basis of the informal amendments were closer to Dunham's vision of emergency powers becoming permanent than to Ackerman's reconstruction of the voice of the People. Dunham

⁵⁷⁶ Nevertheless, Sutherland's dissent in *Blaisdell* seems to suggest a similar argument. The dissent cites at great length historical evidence purporting to show that the Constitution was drafted amidst widespread foreclosure comparable to that of 1934. For Sutherland, the fact that the contract clause was drafted in these conditions proves that it was meant to forbid impairment of contracts without exception, no matter how severe the foreclosure crisis. From this he concludes that the majority's emergency doctrine "constitutes an effort to overthrow the constitutional provision by an appeal to facts and circumstances identical with those which brought it into existence. With due regard for the processes of logical thinking, it legitimately cannot be urged that conditions which produced the rule may now be invoked to destroy it" (473). The accuracy of Sutherland's constitutional history aside, he is right to worry that *Blaisdell's* emergency powers to combat foreclosure cannot be expected to return to a status quo ante that was indifferent to widespread foreclosure.

argued that freedom of contract must be made compatible with “the security of the masses,” and that the judiciary’s duty was to play a leading role in “restoring a sense of economic security in the mind of the common man.” The reasons he gives are the increased socio-economic complexity of modern society, and the need to silence “agitators” who take advantage of insecurity to “shake the faith of the common man” in the justice and stability of basic institutions. They have nothing to do with the right of the common man or the “masses” to articulate their own needs and priorities and express them as part of a democratic majority.⁵⁷⁷ Before we turn to these developments, however, we first have to see how the contours of the new emergency doctrine were determined in the period between 1934 and 1937.

Determining the New Emergency Doctrine

Blaisdell, *W.B. Worthen*, and *Nebbia* together established the emergency doctrine as a basis for expanding state police powers while at the same time asserting limits in time and scope to that expansion. The doctrine remained untested, however, at the level of the national government. Despite some passing dictum in *Nebbia* suggesting that the Fifth Amendment does not prohibit the federal government from providing for the general welfare, it was unclear how the emergency doctrine would apply to the restrictions of the commerce clause and the conservative view that the federal government lacked independent police powers.⁵⁷⁸ Taking note of the Court’s stance, a host of new regulatory statutes on the national as well as state level began to include emergency declarations in their preambles, along with sometimes lengthy descriptions of the dire conditions requiring relief. In the meantime, lower courts attempted to apply and clarify the new emergency doctrine to the problem of interstate commerce, within uneven results. Some

⁵⁷⁷ Dunham, 180-1.

⁵⁷⁸ *Nebbia*, 1997.

justices, citing the language of the *Blaisdell* majority, nevertheless reverted in substance to the conservative dissent and refused to regard economic conditions, no matter how dire, as an emergency that changed intrastate to interstate commerce.⁵⁷⁹ Other courts, citing the same opinion, suggested that the economic emergency effectively gave all commerce an interstate character.⁵⁸⁰ The absence of clear standards imposed by the emergency doctrine produced confusion and unpredictability throughout the judiciary.

In 1935, the Court decided a series of cases involving aspects of NIRA, the legislative centerpiece of the early New Deal, upholding some parts of the legislation but striking down many of its central provisions. Unlike the 1934 cases, these involved *national* regulatory powers rather than state police powers. The cases together amount to a declaration that while the emergency doctrine may permit a limited range of temporary, provisional emergency measures, it is *not* a green light for abandoning the central priorities of the *Lochner* order. As Hughes wrote in *Schechter*,

Undoubtedly, the conditions to which power is addressed are always to be considered when the exercise of power is challenged. Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority... [The] powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary.⁵⁸¹

Schechter, in other words, acknowledges the emergency doctrine's claim that emergencies do not create new powers but can magnify the occasions for exercising existing powers, while at the

⁵⁷⁹ *US v. Lieto* (N.D. Tex. 1934) cited in *Ibid.*

⁵⁸⁰ *ibid.*

⁵⁸¹ *Schechter*, 528-9.

same time asserting ultimate judicial control over the precise extent of the power at any given time.⁵⁸²

Despite this firm assertion of constitutional limits, the problems encountered at the state level recurred even more severely at the national level: by striking down statutes under the emergency doctrine, the Court demonstrated that the doctrine entails *some* definite limits, but it found itself unable to articulate a consistent rule identifying exactly where those limits are. I shall give a very cursory overview of this attempt to define the limits imposed by the emergency doctrine on national regulatory power by highlighting three separate dimensions: (1), separation of powers (2) and permanence (3).

(1) divided internal sovereignty

While the emergency doctrine provided greater flexibility for state regulations or national control over currency, it was much more resistant to New Deal attempts to redraw the fundamental boundary around a domain of economic life within states that is categorically free from national regulation, regardless of emergency conditions. Hence, *Schechter* concedes that “extraordinary conditions” may furnish a broader scope of national regulatory power over commerce, but such emergency powers may not abolish the distinction between “direct and indirect effects” on interstate commerce. Even the “grave emergency” of the depression is not enough to place

⁵⁸² The government in this case had argued that the economic crisis urgently required national coordination of (amongst other things), wage standards within a host of various industries. Even if the industry itself is within a single state, the emergency economic conditions created clear national interconnections between other industries in other states, placing ordinarily isolated commerce within a emergency “current” of interstate commerce and thereby falling under Congress’ regulatory power. The urgency and complexity of the crisis also required broad delegations of legislative authority to the discretion of the executive. *Schechter*’s counsel took the opposite approach and urged the Court to reject the emergency doctrine itself, arguing that economic crises cannot influence constitutional interpretation or alter the lines between state police power and limitations on Congress.

Schechter's poultry operation in a "current or stream" of interstate commerce. On such an expansive interpretation, "the federal authority would embrace practically all the activities of the people," pushing national authority "to such an extreme as to destroy the distinction" between local and national activity.⁵⁸³

(2) *separation of powers*

A second area where the Court insisted on limitations within the emergency doctrine concerned delegations of legislative authority to the discretion of the executive or to private groups without providing clear standards, guidelines and limitations.⁵⁸⁴ *Panama Refining Co. v. Ryan* struck down a NIRA provision that had authorized broad discretionary regulatory power to the executive. This was an unconstitutional delegation of legislative power, since it applied no standards to limit or guide the executive's discretion.⁵⁸⁵ Significantly, the Court acknowledged precedents of earlier standardless delegations to the executive, but argued that the dangers of war and hostile foreign powers made those delegations legitimate.⁵⁸⁶ *Schechter* applies the same analysis, reiterating the formal limitation and applying it to delegations to private companies as well.⁵⁸⁷

⁵⁸³ Schechter, 194. See also *Retirement Bd. V. Alton R.R. Co.* (1935) and *Carter v. Carter Coal* (1936).

⁵⁸⁴ Interestingly, in *Panama* the Court cites a series of late 18th and early 19th century delegations that did authorize broad, standardless executive discretion, but distinguished the *economic* emergency from these earlier precedents because the earlier delegations involved the dangers of war and hostile foreign powers. *Panama*, 422-3.

⁵⁸⁵ *Panama*, 418-20.

⁵⁸⁶ *Panama*, 422-3.

⁵⁸⁷ would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? And could an effort of that sort be made valid by such a preface of generalities as to permissible aims as we find in section 1 of title 1? The answer is obvious. Such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress." *Schechter*, 537. *Carter Coal* also invalidated delegations of legislative power, this time to partially private "trade or industrial associations or groups," rather than to the executive. In practice, all three cases involved self-regulation by private

(3) Temporal limitations: provisionality

The Court also struck down Congress' attempt to relieve the extraordinary wave of foreclosures that was sweeping hundreds of thousands of farmers from their homes.⁵⁸⁸ Accepting the government's contention that *Blaisdell* is the controlling precedent and that the issue falls within the emergency doctrine, the Court nevertheless found that the law exceeded the legitimate emergency powers that could have provided a reasonable remedy.⁵⁸⁹ Unlike the provisional and temporary character of Minnesota statute in *Blaisdell*, the five year duration of the national law was deemed too long for the brief emergency provision that would have been authorized. Similarly, the following summer the Court struck down a New York State minimum wage law for women, arguing that the law violated the time and breadth limitations required by legitimate emergency powers, concluding that "the Act is not to meet an emergency; it discloses a permanent policy."⁵⁹⁰

Toward 1937: the breakdown of the emergency paradigm

These clarify the boundaries of the new emergency doctrine were not particularly successful. The limited expansion of the commerce clause through the emergency doctrine proved even more troublesome. In the *Lochner* era, the distinction between inter- and intrastate commerce was held to be a matter of categorical, formal rules, unaltered by external conditions; this inflexible approach at least made it easier for judges to represent their activity as the non-political

industry; whatever agreement the different private groups reached among themselves acquired force of law through an executive order, but this was essentially a rubber stamp. See Horowitz, *Transformation*, 208.

⁵⁸⁸ *Louisville Joint Stock Land Bank v. Radford*

⁵⁸⁹ *Louisville Joint Stock Land Bank v. Radford* (1935).

⁵⁹⁰ *Morehead*, 604, 615. See also "New Deal," 2003.

identification and application of per se legal rules. As the growth of a national, industrial economy increasingly made distinctions between “intra- and infra-state” and “direct and indirect affect” less plausible, judicial decisions increasingly appeared as driven by ideology rather than legal reasoning, and judges found it more and more difficult to maintain the separation between law and politics. The emergency doctrine rescued the Court from the trap of politicization by abandoning the categorical approach and acknowledging the dynamic nature of society. By the same stroke, it plunged the Court into the even more hazardous task of determining the degree to which an emergency strengthens the “flows” or “streams” that linked an activity to interstate commerce, or judging whether those flows would be too “faint,” obscure and “broken by cross currents” when analyzed in relations to a set of highly complex and debated socio-economic conditions. For critics, these aquatic metaphors did little to mask the arbitrary and ad hoc character of the decisions and the court’s failure to clarify a consistent standard from case to case. The entire approach succeeded in further undermining rather than bolstering the separation between politics and law, exposing the Court and the entire constitutional order to charges of ideological obstructionism and usurpation.

Delegation, too, proved difficult to contain once the emergency doctrine replaced general rules for flexible guidelines. The emergency doctrine preserved the assumption that the *Lochner* status quo ante remained valid law, and therefore regarded all regulatory reforms as temporary “emergency” measures, temporarily required by the economic emergency. The *Lochner* order rested on the assumption that abstract, general rules can determine concrete cases. The emergency doctrine effectively declared that in an emergency, the concrete case itself determines the scope of the general rule, and the judicial activity in an emergency must proceed from the particular to the general rather as well as from the general to the particular. This was the essence

of Hughes idea of “fluctuating” powers. If an “emergency” is by definition a condition in which the particular circumstances determine the scope of the general rule, it then became difficult to maintain the hierarchy of general norm/particular application that undergirds the *Lochner* order’s assumptions about the separation of powers. This in turn poses a challenge to the delegation doctrine, particularly the basis for the delegation doctrine’s premise that general statutory language must provide determinate limitations to administrative discretion.⁵⁹¹ In this case as well, indeterminacy, initially conceived as a strategy for depoliticizing law, leads the Court directly into the role of a political actor.

Finally, after the resounding electoral victories 1934, the Court’s insistence that emergency measures be provisional and time limited appeared less like prudent oversight and more like an increasingly desperate form of wishful thinking. After the 1934 mandate, and even more so after the 1936 landslide victory, New Dealers unhesitatingly spoke in the language of democratic renewal, fundamental reform and constitutional revision, not that of temporary and provisional emergency measures. After the 1936 elections, “political opposition to the New Deal was virtually wiped out.”⁵⁹² Moreover, the deepening of the recession and the scope of the national reform made the assumptions about temporary “relief” measures look out of touch with reality. By this time, it was exceedingly difficult to deny that the depression was a structural condition resulting from an array of deep economic forces that required a systematic response. If the “emergency” was long-term or even permanent, it was equally obvious that the New Deal legislation was not predominantly temporary relief measures aimed at alleviating symptoms; much of it was long-term or permanent fundamental reform, aimed at the structural causes of the

⁵⁹¹ This was the argument developed by Landis, *The Administrative Process*. See Horowitz, *Transformation*, 216.

⁵⁹² Skowronek, *Politics Presidents Make* 313.

depression through a transformation in the relationship between the state and society.⁵⁹³ These conclusions were reached not only by progressives but also by large numbers of moderates and even considerateness. Ogden Mills, Secretary of Commerce under President Hoover, gloomily acknowledged that “so intricate and pervasive are [the reform legislation’s] potentialities in the reorganization of the habits of men and of economic and governmental relationships that one may speculate upon the facility of readjustment at the close of any particular period of time.”⁵⁹⁴

All of these difficulties – its inability to determine consistent criteria for the scope, breadth or duration of emergency powers, its difficulties with the problem of indeterminacy and the status quo ante, the embarrassing gap between its fictive rationale and socio-economic and political realities – all contributed to the collapse of the emergency doctrine as a plausible judicial framework for the New Deal.

III. The New Deal Constitution: Dualist Democracy or Permanent Emergency?

Did the Court, as Ackerman’s interpretation would suggest, abandon the anti-democratic premises of the preceding three years together with the emergency doctrine? The question is relevant since, as we’ve seen, part of the attraction of the emergency doctrine in the first place was that it appeared to offer a way of avoiding the “higher lawmaking” ambitions of the New Deal reforms. Ackerman is certainly justified in arguing that Roosevelt and other important New Dealers had been speaking in a self-conscious discourse of constitutional renewal, if not dualist democracy. But the judicial synthesis component of the argument is lacking. Unfortunately, the cases themselves offer no evidence of the fundamental message Ackerman wants to claim for

⁵⁹³ Holsebach, “New Deal Court,” 2007

⁵⁹⁴ quoted in *ibid.*, 2008

them.

If they were not confirmations of an episode of popular constitution making, what was the nature of the “switch” announced in *NLRB* and *West Coast*? Once again, focusing on the framework of emergency powers yields a different account of the levels of continuity and break than other major interpretations. What were the continuities? First, in both cases, the Court upheld the legislation in question on the basis of the same theory of constitutional powers identified by the emergency doctrine. In *NLRB*, it is Congress’ regulatory power under the commerce clause, and in *West Coast*, it is the state’s police power over safety and welfare. Secondly, the relationship between the constitutional authority of the power, and the legitimate ends of the legislation was also carried over from *Blaisewell* and the emergency doctrine. In *NLRB* the “immediate” and “catastrophic” consequences of industrial strife on the flow of interstate commerce are sufficiently grave to extend the regulatory powers granted by the commerce clause to the domain of labor relations. And in *West Coast*, the especially vulnerable status of women laborers to economic exploitation, in light of the “alarming” and “unparalleled demands for relief” caused by the depression on the public are sufficient to make the contractual terms of women workers a legitimate object of the state’s police powers.⁵⁹⁵

Although the scope of these powers are extended beyond some of the earlier emergency doctrine rulings, neither of these cases departs from the *Blaisdell* framework for expanding ordinary powers granted by the constitution to meet new social needs of increased regulation. In this respect, the new framework is strikingly reminiscent of the old framework. Where, then, does the switch occur? The difference is that *NLRB* and *West Coast Hotel* abandon the three year attempt under the emergency doctrine to impose consistent time and breadth limitations to the

⁵⁹⁵ *West Coast*, 399

new regulatory powers. The switch cases maintain the doctrine's enhanced regulatory powers, and the increased recognition of society as a vital object of regulation. But the Court's prevailing fiction that the expanded regulation was a temporary expedient for the sake of returning to the constitutional norm of *laissez faire* dropped away. In practical terms, the switch in time consists in the Court's decision that the emergency powers have become permanent, and the emergency has become the new norm.

This formulation will undoubtedly seem objectionable. While Ackerman may have read too much dualist democracy into the switch cases, characterizing them as an authorization of permanent emergency powers goes much too far in the opposite direction, depriving the Court's deference to the elected branches of any democratic content. Two main qualifications are in order. First, we have to keep in mind that the "emergency powers" made permanent here were largely of the Court's own making, devised in order to accommodate some of the relief legislation without acknowledging a departure from the *Lochner* order. The emergency powers of *Blaisdell* are, literally, regulatory powers of the legislature by another name – although I shall argue in a moment that the path by which these powers were constitutionalized is nevertheless important. A second, related, qualification is that the juridical designation of the New Deal programs – before and after the switch – does not determine their significance in other spheres. The political significance of a relief program in the relationship between a representative and his constituents, or in the public sphere, or in the historical imagination cannot be reduced to its judicial designation as an "emergency measure" or a "police power." With these two provisos in mind, we can still refer to the switch as the normalization of emergency powers over society on the level of what Ackerman refers to as the "constitutional meaning" of the new synthesis

created by the Court.⁵⁹⁶ Why does this constitutional meaning matter?

For our purposes, it matters in the most general sense because it helps embed a new, post-New Deal constitutional relationship between state power, individual rights and the security of society. This constitutional framework, partly shaped by the process I have been describing, will play a fundamental role in shaping the course of other, non-economic forms of emergency powers. Before turning to that argument, I want to suggest one way that it mattered for the social legacy of the New Deal itself.

One of the reasons for resisting Ackerman's normative reconstruction of the switch in time is that it obscures the meaningful historical possibilities of a more democratic constitutional legacy of the New Deal. One the deep currents running throughout the constitutional aspirations of this period that falls out of Ackerman's account is the theme of what I will call, following William Forbath, "social citizenship." The proposal of social citizenship resonates through countless speeches, address and fireside chats of Roosevelt and other progressive New Dealers, and formed an important link between the administration and labor and social movements outside the Democratic party. It underlay many of Roosevelt's central themes such as "a second Bill of Rights," the Four Freedoms and his frequent support for "a right to work."⁵⁹⁷

A core feature of the New Deal conception of social citizenship is that it is a discourse explicitly based on *rights*, expressing the idea that decent work, a decent livelihood, social provisions and a degree of economic independence and democracy should be available to all citizens.⁵⁹⁸ Legal historian Gray Pope has argued that this theme of the New Deal drew from a rich, unacknowledged history of interpreting the 13th and 14th Amendments as a source for social and economic as well as civil rights. The centrality of rights in the New Deal concept of social

⁵⁹⁶ Ackerman, *Transformations*, 343.

⁵⁹⁷ Foner, *Story of American Freedom*...

⁵⁹⁸ Forbath, "Constitutional Change and the Politics of History," 1925.

citizenship was in sharp contrast with the Court's framework of expanded regulatory and protective powers. Social citizenship proposals sought to extend the equal protection of individual civil and political rights to include a domain of social and economic conditions relevant for the exercise of civil and political freedom. Breaking with the *Lochner* order's rigid priority of fixed private rights over democratic law-making, the social citizenship proposals expressed a dynamic "system of rights" that linked public and private autonomy together in a more robustly democratic vision of liberal constitutionalism.⁵⁹⁹ As Eric Foner suggests, it was a theme that referred not only to the New Deal as a major reform in the government's role to provide welfare and coordinate the national economy, but also to the dramatic forms of democratic inclusion and the expansion of citizenship the New Deal achieved.

In contrast, as we saw earlier the common law basis of police powers is in and of itself both neither democratic *nor* liberal but absolutist and explicitly paternalistic. Modern police powers still retain an imprint of their patriarchal common-law heritage expressed in Blackstone's definition as the sovereign's "oeconomical" dominion over his realm conceived as a private household. They describe the state's "protective" power over social collectivities or society as a whole for managerial, regulative or preventative purposes. Hence, police powers generally imply a degree of hierarchical governance, discretion, and disciplinary sanctions for prospective regulatory purposes.

Of course, I should stress that the term in American law is for the most part synonymous with ordinary administrative powers that are perfectly compatible with, and to some extent required by, constitutional democracy.⁶⁰⁰ It is nevertheless true that the common-law origins of

⁵⁹⁹ See Habermas, "Three Normative Models of Democracy," in Habermas, J., C. Cronin, et al. (1998). The inclusion of the other studies in political theory. Cambridge, Mass., MIT Press.

⁶⁰⁰ I must to be careful to avoid two mistakes often committed in the recent police powers literature: first, the temptation of using the semantic polyvalence of the word police as evidence of a causal or logical relationship

the police power in relations of hierarchy, non-reciprocal rights and duties and social dependence make it potentially even more resistant to “democratization” than other, more neutral forms of administrative power. These origins are evident even in *West Coast Hotel*, which notes that the health, safety and welfare concerns that authorize the police powers are *especially* relevant in the case of women, “in whose protection the state has a special interest.”⁶⁰¹ Hughes approvingly cites the Court’s earlier finding that

"woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence," and that her physical wellbeing "becomes an object of public interest and care in order to preserve the strength and vigor of the race." We emphasized the need of protecting women against oppression despite her possession of contractual rights.

Of course one could object that neither this embarrassingly outdated dictum nor the arcane legal title of “police powers” make any difference at all to the effects of the decision and the precedent it establishes. The significance of the case is that the Court deferred to the democratically elected state legislature, making the technical continuity with the emergency doctrine irrelevant. This objection is valid, but only in a very limited sense. The legal categories used by the Court cannot determine the significance of the political outcomes outside a narrowly legal domain. It is not true, however, that the continuities with the emergency doctrine are political irrelevant. On the contrary, the failure of the synthesis cases to repudiate the emergency doctrine was deeply consequential.

between very different things. Secondly, of extracting an especially exotic, archaic meaning associated with “police power” from hundreds or even thousands of years ago as evidence of an ominous “secret” or “hidden” meaning in the present. See Dubber, M. D. and M. Valverde (2008). *Police and the liberal state*. Stanford, Calif., Stanford University Press.

⁶⁰¹ *West Coast*, 394.

The consequences become clearer by comparing the regulatory powers approach derived emergency doctrine with the alternative of deriving social citizenship on the basis of rights set out in the 13th and 14th Amendment. This rights-based approach is not an imaginary, hypothetical alternative, but was the constitutional vision developed by labor, social movements and by some progressive intellectuals, and played a vivid role in the core constitutional debates of the period.⁶⁰² As William Forbath points out, in the months preceding the *NLRB* case,

the lawmakers and the president argued not simply that Congress had the power under the Constitution, rightly understood or amended, to regulate agriculture, industry, and labor. They argued that citizens had fundamental economic and social rights under the Constitution, rightly understood or amended; and Congress, therefore, had the duty to exercise its power to govern economic and social life in a way that sought to secure those rights.⁶⁰³

In other words, the rights based approach binds the increased regulatory power to the expansion and evolution of the basic content of the rights of citizens, expressed through the democratic process. In contrast to Ackerman's narrative, in which the 1936 campaign and electoral mandate represented a constitutional choice for expanded national regulatory powers, the foundation of New Deal constitutional politics was a new conception of social citizenship, demanding a recognition of new rights, and new rights-bearers that provided the democratic character to the new expanded national powers.⁶⁰⁴ We can imagine a "dualist democratic" switch in time, in which the 13th and 14th Amendments, rather than the federal commerce or the state police power, become the basis for the constitutional status of the rights of labor to collective bargaining and

⁶⁰² See Forbath, W. (1999). "Caste, Class, and Equal Citizenship." *Michigan Law Review* 98(1); Pope, "Labor's Constitution of Freedom."

⁶⁰³ Forbath, "New Deal Constitution in Exile," 176.

⁶⁰⁴ Forbath, "Caste, Class and Equal Citizenship," 67-8.

the rights of individual workers to a living wage.⁶⁰⁵ In this scenario, the *continuity* with the older order would have been the immanent democratic and social dimensions of the rights enshrined in the Reconstruction Amendments, and the *rupture* would have been only with the *Lochner* Court's distorted reduction of "due process" to the inviolability of property. In other words, the moment of rupture would have been to recognize the centrality of democratic interpretation and articulation in the system of rights, without rejecting the principles of rational autonomy and the prohibition of forced dependency that underlay the *Lochner* supremacy of "freedom of contract." On this interpretation, the New Deal language of "a second Bill of Rights" and "industrial democracy" did not imply the abolition of these principles but, on the contrary, their openness to continual democratic revision, interpretation and expansion.

Chapter VI: National Security and the Emergency Constitution

⁶⁰⁵ Pope, "The Thirteenth Amendment versus the Commerce Clause"; Forbath, "New Deal Constitution in Exile"

Blaiswell's combination of inherent and flexible temporary emergency powers and the police power was not, however, laid to rest in 1937. Outside the sphere of economic regulation it persisted, and indeed as I shall argue, formed the basis of the “emergency constitution” that has helped shape emergency powers until the present. The foundations for the modern emergency constitution were established during World War II. The edifice itself, however, emerged in the years following 1945, in the midst of two crucial developments that helped open an enormous gap into which emergency police powers would expand.

The first major development was a shift away from the binary contrast we saw in chapter four between peace and war as distinct, mutually exclusive conditions. The successor to this is the notion of international police action, which replaces the stark, binary contrast with a broad, intermediate grey area designating both actual uses of military force the ongoing, prospective readiness to do so.⁶⁰⁶ Indeed, after 1945 there have been no formal Congressional declarations of war. Subsequently, the separation of powers in executive-led armed conflicts has itself become a grey zone, consisting in a variety of different authorization models and distinctions in the degree of the use of force. This transformation involved more than the separation of powers.⁶⁰⁷ It also had the potential of effecting the distinctions between the paradigms of crime and war, and ultimately on the axial separation between the juridical spaces of internal and external sovereignty itself. Amid intense Cold War mobilization and profound worries of a new age of the “garrison state” and atomic warfare,⁶⁰⁸ the emergency police powers doctrine was shifted into the space vacated by the war paradigm, providing constitutional continuity and flexibility in the

⁶⁰⁶ Ron Levi and John Hagan, “International Police,” in Dubber and Valverde, *The New Police Science*.

⁶⁰⁷ Jules Lobel, *Emergency Powers and the End of Liberals*; Louis Fisher, *Military Tribunals*.

⁶⁰⁸ Lasswell, H. D. (1977). *Harold D. Lasswell on political sociology*. Chicago, University of Chicago Press. (1941); Corwin, E. S. (1947). *Total war and the Constitution; five lectures delivered ... at the University of Michigan, March 1946*. New York, A. A. Knopf. See also Clinton Rossiter, “Preface” in *Constitutional Dictatorship*; Schlesinger, A. M. (1949). *The vital center; the politics of freedom*. Boston, Houghton Mifflin Co.

transition from isolationist republic to global superpower.⁶⁰⁹

The second, corresponding, development was a fundamental transformation in the understanding of emergency that was completed in the shift from the martial law model of self-preservation to the concept of national security. The term national security, virtually unknown before the 1940s, ascended in a few short years after 1945 to constitute its own field of social scientific knowledge, and played a central role in public discourse about domestic and international politics that roughly tracked the paradigmatic shift from war to police actions.⁶¹⁰ The concept of national security reformulated the identity of the “self” involved in the state’s right to self-preservation. Unlike the early modern natural law conception, national security implied productive powers necessary to create and maintain a positive vision of an international order.⁶¹¹ It replaced the skeletal forms of sovereign equality and reciprocity with a differentiated and complex order of “international society” existing simultaneously in multiple social, economic and ideological as well as political dimensions. Like domestic police powers, national security involved a mixture of consensual and coercive means that was not fixed in advance but fluctuated in response to particular conditions and circumstances. And just as the criteria of “social security” created fundamental challenges to the clear temporal and spatial limitations of “commissarial” emergency powers, national security would prove to be even more formidably resistant to limitation.

Before describing the structural complexities introduced by national security in the emergency constitution, I want to look first at the early foundations of this structure in the

⁶⁰⁹ Jules Lobel, “Emergency Powers and the End of Liberalism.”

⁶¹⁰ See for instance, Leffler, M. P. (1992). A preponderance of power : national security, the Truman administration, and the Cold War. Stanford, Calif., Stanford University Press.; Sherry, M. S. (1995). In the shadow of war : the United States since the 1930's. New Haven, Yale University Press.; Mark Neocleous, *Critique of Security* chap. 3.

⁶¹¹ Yergin, D. (1977). Shattered peace : the origins of the cold war and the national security state. Boston, Houghton Mifflin.

; Levi and Hagan, “International Police”; Sherry, *In the Shadow of War*

Second World War. The first section, describing the military tribunals used to try German saboteurs, analyzes the blurring of the crime and war paradigms in the novel category of “unlawful belligerency” that emerges from that episode. The second section discusses the reinterpretation of war powers through the *Blaiswell* doctrine of emergency police powers that framed the constitutional understanding of the Japanese internment.

Effective Sovereignty in Action: The Security Function and the Nazi Saboteurs Trial

The case involved eight German saboteurs who landed on beaches in Long Island and Florida in 1942.⁶¹² The men were recruited and trained to infiltrate the United States and blow up selected targets, but the plan went awry and one of the men turned himself in to the FBI, who quickly rounded up the others. Initially, the FBI assumed that the group would be tried in civilian courts. But to avoid making public how easily the saboteurs infiltrated the borders, as well as the administrations embarrassing incompetence in detecting the men, FDR decided to use military tribunals and prohibit any appeals to civil courts.⁶¹³ Additionally, the Administration had little confidence that civilian courts could deliver the politically desired outcome. The statute on sabotage only carried a maximum penalty of thirty years, and since the men had not actually committed any acts, it appeared highly unlikely that the government could convict. The government could have tried the men for conspiracy, but conspiracy carried a maximum penalty of three years, hardly suitable for the propagandizing purposes of the cases.⁶¹⁴ A military tribunal could avoid disclosures embarrassing for the government, and it could swiftly deliver the death

⁶¹² My summary draws from the fascinating account in Louis Fisher, *Nazi Saboteurs on Trial: Military Tribunals and American Law*. (University Press of Kansas: 2005).

⁶¹³ One of the Germans, George Dasch, seems to have planned from the outset to turn himself over the US. It took a full three week, after multiple attempts, to persuade the FBI to respond and take Dasch seriously. Newspapers subsequently reported that the saboteurs were immediately apprehended on arrival, hence the administration’s concern about a public trial. See Fisher, *Nazi Saboteurs*, 40.

⁶¹⁴ *ibid*, 40.

penalties desired by the administration.

The president issued a proclamation on July 2 1942, creating the military tribunal to try the saboteurs “in accordance with the laws of war.”⁶¹⁵ This reference to the *laws* of war rather than the *Articles* of War, is interesting. The Articles of War refer to the group of statutes, first enacted by the continental congress, but substantially updated and revised by Congress in the 1910s and 20s, which established the system of military justice and court marshal. The *laws* of war are not statutory at all but refer to the “laws of nations,” the unwritten of practices and customs that modern natural right theorists such as Grotius and Hobbes associated with the laws of nature among states.⁶¹⁶ They are also the unwritten “laws” that are enforced under the martial law paradigm by the will of the general, as we saw in Chapter four. The consequence was highly significant. A violation of the Articles of War would have been tried by courts marshal, for which there were highly regulated criminal procedures that imposes due process and evidentiary standards generally equivalent to those of civil courts. Violation of the customary *laws* of war do not need to be defined by any statute at all, but can be “interpreted” by the president. Moreover, they do not require a courts marshal but can be tried in a military tribunal established by the executive, free to pick and choose the trial procedures and evidentiary standards at will.⁶¹⁷

The proclamation stated that anyone owing allegiance to a belligerent nation who enters the United States “shall be subject to the law of war and to the jurisdiction of military tribunals,” and denied access to civil courts. In other words, resorting to the laws of war rather than any statute allowed the president to informally and materially suspend the writ of habeas corpus

⁶¹⁵ President Franklin D. Roosevelt, Proclamation 2561 “Denying Certain Enemies Access to Courts” available at <http://www.presidency.ucsb.edu/ws/index.php?pid=16281>

⁶¹⁶ A measure of the indeterminacy of the laws of war is that they technically include, for example, the order that whoever murders a man on a ship “shall be bound to the dead man and thrown into the sea.” If the murder occurs on land, the murderer is to be tied to the victim and buried with him. Quoted in Fisher, *Military Tribunals*, 1.

⁶¹⁷ Proclamation 2561

solely for the eight saboteurs, without requiring any formal, public suspension, as had occurred during the Civil War. In contrast to the martial law model, the order created military tribunals without any internal disruption of sovereignty (there was no question of the ability of ordinary courts to open their doors and function). Indeed, the motivation for the tribunal was exactly the contrary of proclaiming a disruption of internal order. The paradigm of criminal justice was suspended because the administration was eager to keep the government's ineptitude in apprehending the men from becoming public. Hence the administration made the total secrecy of the proceedings a top priority, for reasons of national security. In fact, internal correspondence between Roosevelt and Attorney General Biddle demonstrate that the actual reason for the tribunal's secrecy was that their anxiety that a public trial would reveal that the administration had lied to obscure its incompetence.⁶¹⁸ The purpose of the tribunal was to maintain the image of the state's total control over the territory and maintain public security, and the legal instruments of the trial was the creation of a new, ad hoc exception to that transformed the eight men from accused criminals to enemy belligerents.

The Supreme Court accepted an application for a writ of habeas corpus from the saboteur's military lawyer and upheld the jurisdiction of the military tribunal. The full opinion, issued three months later, effectively replaces the axial distinction between effective and disrupted conditions of internal sovereignty cited in *Milligan* with a different distinction, between lawful and unlawful enemy combatants.⁶¹⁹ *Lawful* combatants are subject to preventative detention for the duration of the war, to prevent them from returning to the battlefield. But they can only be *detained*; they cannot be *prosecuted* because they have not committed a crime. They are public enemies, but they are not criminals. Thus, the status of

⁶¹⁸ Fisher, *Military Tribunals*, 101.

⁶¹⁹ *Ex parte Quirin*, 91

prisoner of war does not imply law violation and criminality, only a state of declared belligerency. *Unlawful* combatants are subject to preventative detention, but “in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.”⁶²⁰ In other words, the unlawful combatant is *both* criminal and belligerent. As a legal category, it represents the complete fusion of the paradigms *crime* and *war* – the separation and distinction of which, I argued in Chapter 3, was a fundamental prerequisite of the modern constitutional order.

War Powers as Police Powers: Hirabayashi and Korematsu

Although Korematsu is often regarded as a classic – if lamentable – “war powers” case, I want to show that, like *Quirin*, its apparent congruence with the 19th century paradigm of war powers obscures a thoroughgoing transformation. The constitutionality of the Japanese internment rests on three features that were alien to the earlier war paradigm: the flexible emergency constitutionalism of *Blaiswell*, the model of police powers applied to the national government, and the considerations of security as a yardstick for the extent of constitutionally sanctioned power. In addition, like *Quirin* the Japanese Internment cases are paradigmatic instances of effective sovereignty emergencies. Just as the decision to suspend the criminal justice model and create a military tribunal was driven by concerns about public opinion rather than any military necessity, so too the determinations of military necessity claimed for Japanese internment were notoriously baseless. Rather, the motivations appear to have been primarily concern for “effective sovereignty” in this case as well.⁶²¹ In order to see how the structure of the new war

⁶²⁰ 91.

⁶²¹ See Irons, P. H. (1993). *Justice at war*. Berkeley, University of California Press.

powers derives from *Blaiswell*, we must clarify a few key themes at the outset: the hybrid mélange of police power and enmity at the basis of the detention itself and the judicial effort to normalize the exception by locating it within ordinary constitutional powers, and at the same time contain the exception by subjecting it to time and breadth restrictions.

Police powers

The paradigm of police powers, exercised for the benefit of the affected population not only shaped the administration of the program, it also guided the government's legal defense of the order when it was challenged in court. Peter Irons, in his classic study of the internment, explains that the two pillars of the government's legal strategy were "constitutional" argument based on war powers, and "factual" argument based upon police powers:

Government lawyers would first urge on the courts an expansive reading of the President's vaguely defined war powers, justifying the application of DeWitt's orders to a single "class" of citizens by analogy to the police powers of the states. The factual basis for the orders would rest on the argument that the distinctive "racial characteristics of Japanese Americans predisposed them to disloyalty... sabotage and espionage, thereby supporting the "military necessity" claim on which the orders rested.⁶²²

By the time of the *Korematsu* hearings a year and a half later, the government dropped the military necessity defense altogether, and submitted documents demonstrating that the exclusion was necessary for the security of the Japanese Americans themselves. As the defense council put it, the purpose of the order was to "prevent incidents involving violence between Japanese

and Mai Gnai, "An Ironic Testimony to the Value of Democracy: Assimilation and the World War II Internment of Japanese Americans" in Sinha, M. and P. M. Von Eschen (2007). *Contested democracy : freedom, race, and power in American history*. New York, Columbia University Press.

⁶²² Irons, *Justice at War*, 127.

migrants” and their white compatriots who blamed them for Pearl Harbor. The *Hirabayashi* and *Korematsu* decisions do not inquire into the grounds for the “pressing public necessity.” But the security of the Japanese-Americans appears to play a role in Stone’s reasoning in the earlier *Hirabayashi* decision, upon which the *Korematsu* is almost entirely based.

As a result of all these conditions [preventing assimilation] affecting the life of the Japanese, both aliens and citizens, in the Pacific Coast area, there has been relatively little social intercourse between them and the white population. The restrictions, both practical and legal, affecting the privileges and opportunities afforded to persons of Japanese extraction residing in the United States have been sources of irritation, and may well have tended to increase their isolation, and in many instances their attachments to Japan and its institutions.⁶²³

In this case as well, the actual grounds for determining Japanese Americans to be “a menace to the national defense and safety” are *not* military necessity per se but a kind of military necessity as determined by a judgment about effective sovereignty.⁶²⁴ In other words, the justification has shifted here from something based on the state’s right to self-preservation against immanent threat to the state’s right to establish overall security of the social order.⁶²⁵

The Court heard three different cases involving different aspects of the military orders, and insisted that each decision applied only to the specific issue involved. *Hirabayashi*, decided in June 1943, upheld *Hirabayashi*’s conviction for violating a *curfew* that applied only to persons

⁶²³ *Hirabayashi*, 98.

⁶²⁴ *Ibid.*, 143.

⁶²⁵ Contrast with Justice Murphey’s dissent in *Korematsu*, which rejects the flexible view in favor of a stricter standard: military necessity can justify a deprivation of constitutional rights only when “the deprivation is reasonably related to a public danger that is so ‘immediate, imminent, and impending’ as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger.” Justice Murphey, dissenting, *Korematsu*, 234.

of Japanese descent.⁶²⁶ *Korematsu*, decided in December of the following year, upheld *Korematsu*'s conviction for remaining in his native city in violation an “*exclusion order*” that “excluded” all persons of Japanese descent from a designated military zone. *Endo*, decided on the same day as *Korematsu*, concerned the detention itself, holding that the War Relocation Authority had no power to a citizen once her loyalty was confirmed and she was cleared for release.

These decisions are almost universally criticized today,⁶²⁷ and *Korematsu*'s sanction of the exclusion order, which comes closest to authorizing the camps themselves, has understandably stood out in comparison to the other decisions. The denunciation of *Korematsu* is correct, but the grounds for it are distorted. Read in isolation, as a single decision, *Korematsu* appears to stand for the principle of extreme judicial deference in war, so that the war power, defined as the power to wage war successfully, is effectively *unlimited* in whatever the executive determines is required for more successful warfare. The three cases together, however, yield a different conclusion: the basis of *Korematsu* and its companions is not extreme judicial deference; it is *temporary* and *limited* judicial accommodation through a framework of emergency powers. The limits in terms of both time and scope, and therefore the significance of *Korematsu* derive from its relationship to the companion cases. The stakes, therefore, of the relationship between the cases is very high, which accounts for why they were the source of the most bitter controversy among the dissenting justices. Moreover, they are also important for our

⁶²⁶ in fact, Hirabayashi was also convicted for violating an exclusion order. His sentences for violating both orders were to be run concurrently. In an obvious attempt to dodge the weightier implications of the exclusion order, the Court considered only the curfew violation, and after upholding it determined that since the sentences were concurrent there was no need to consider the exclusion order. Despite this, it was forced to confront the exclusion order later on in *Korematsu*.

⁶²⁷ Despite this, it is often pointed out that Hugo Black, who would subsequently become the strongest civil libertarian in Supreme Court history, asserted near the end of his career that he stood by his majority opinion in *Korematsu* without regret.

purposes, because they illustrate the reappearance of the dialectic of accommodation and limitation in the emergency doctrine following *Blaiswell*.

Between crime and war

Unlike in Hawaii (then a territory rather than a state) and other Pacific colonies, martial law was not declared in the West Coast, nor were military tribunals involved in the Japanese internment. Instead, both *Hirabayashi* and *Korematsu* were convicted of a *crime*, in violation of a statute passed by Congress, *not* with the military and executive orders establishing the detention. In both cases, the majority insisted on the technical distinction between the statutory basis of the *criminal conviction*, and the internment itself. The internment, based on the logic of *preventative* detention rather than retributive justice, was a wholesale departure from the crime paradigm. Indeed, the majority opinions and even the government itself openly acknowledged that the majority of the detainees were inevitably loyal citizens and residents who did not pose any security risk. The argument was that racial and cultural characteristics made it impossible to distinguish the loyal population from dangerous saboteurs, and the urgency of the emergency made preventing “false positives” more important than “false negatives.”⁶²⁸

The paradigm of crime remained relevant to the internment cases because of the Act of March 24, 1942, passed by Congress shortly after most of the West Coast had been declared a military zone, but before the military issued any specific orders to residents of Japanese ancestry. Without mentioning any particular orders or groups affected, the Act made it a crime to disobey

⁶²⁸ Douglas’ concurring opinion is particularly anxious to justify abandoning the crime paradigm out of concern for false negatives: “Nor are we warranted, where national survival is at stake, in insisting that those orders should not have been applied to anyone without some evidence of his disloyalty. The orders as applied to the petitioner are not to be tested by the substantial evidence rule. Peacetime procedures do not necessarily fit wartime needs. It is said that, if citizens of Japanese ancestry were generally disloyal, treatment on a group basis might be justified. But there is no difference in power when the number of those who are finally shown to be disloyal or suspect is reduced to a small percent... where the peril is great and time is short, temporary treatment on a group basis may be the only practical expedient...” Douglas, *Hirabayashi* Concurring, 106-7.

all military orders within the declared military zone. *After* the statute was passed, the military issued the curfew, exclusion or internment orders, but did not enforce them through military justice. Instead, disobedience to the orders would be treated as ordinary *crimes*, tried in civilian courts. Though Hirabayashi and Korematsu disobeyed different military orders at different times, were both convicted in ordinary civilian courts of violating the March 24th statute. Since the statute itself did not suspend habeas corpus or single out Japanese ancestry, and since those accused of violating it were not deprived of their due process rights to contest the charges, it remained within the crime paradigm in terms of its *form*.

Its *content*, however, derived from the military orders themselves, which radically and explicitly dispensed with the crime paradigm. By providing blanket legislative sanction to subsequent military orders, the March 24 Act effectively delegated to military commanders the authority to pass criminal laws. It gave legal authorization to the deprivation of more than a hundred thousand citizens and legal residents of their liberty, on the basis of “racial characteristics” alone. The legal basis of the Japanese internment, therefore, itself expressed the simultaneous presence of the two mutually exclusive paradigms in terms of a contradiction between the Act’s *form* as a criminal statute, and its *content* as a measure of (supposed) military necessity.

The return of Blaiswell and the emergency doctrine

Hirabayashi challenged his conviction under the March 24 statute of violating a military curfew order on two separate constitutional grounds, both of which pertain to the problem of the war and crime paradigms implied by the contradictions between the form and content of the statute. The first challenge, explicitly invoking the New Deal delegation precedents from the Hughes Court

discussed in the previous section,⁶²⁹ argued that Congress had failed to provide any standards to guide the military authorities in issuing their orders. The formal generality of the statute amounted to an unconstitutional delegation of legislative authority to the military command. The second argument targeted the content. By singling out only persons of Japanese descent, the military curfew order discriminated on the basis of race in violation of the due process clause of the Fifth Amendment.

Stone's opinion rejected these arguments by dismissing the relevance of *Milligan* and replacing it with the emergency doctrine developed in the early 1930s. Noting that the restrictions were "an emergency war measure" that "involves no question of martial law or trial by military tribunal," Stone quotes *Blaiswell* directly: "The war power of the national government" authorized by the Constitution "is 'the power to wage war successfully.'"⁶³⁰ The means that fall within this constitutional power cannot be fixed in advance but depend upon the external conditions that determine the means necessary to achieve the end that the Constitution establishes for that power. Just as social conditions in 1934 were urgent enough to make mortgage regulation fall within the scope of the state's police powers, the military conditions of the war against Japan could be urgent enough to make the curfew fall within the scope of the government's constitutional war powers.⁶³¹

In a scathing critique of the decisions published in 1945, Eugene Rostow aptly noted the continuity with the police powers cases: "[t]he test followed the lines of the Court's familiar doctrine in passing on the action of administrative bodies: was there 'reasonable ground' for those charged with the responsibility of national defense to believe that the threat was real, and

⁶²⁹ See *Schenk* and *Panama*, discussed in the previous chapter.

⁶³⁰ *Korematsu*, 93.

⁶³¹ *Ibid.*, 93

the remedy useful?”⁶³² Moreover, as Patrick Gudridge points out, the test of “equal protection” also analogizes from the police powers considerations in *Plessy v. Ferguson*: “every exercise of the police power must be... enacted in good faith for the protection of the public good, and not for the annoyance or oppression of a particular class.”⁶³³

Korematsu reproduces the emergency police powers framework and the “good faith” test for racial discrimination in *Hirabayashi*. Indeed, Frankfurter’s concurring opinion puts the matter even more starkly:

we have had recent occasion [citing *Hirabayashi*] to quote approvingly the statement of former Chief Justice Hughes that the war power of the Government is "the power to wage war successfully." [citing *Blaiswell*]... If a military order such as that under review does not transcend the means appropriate for conducting war, such action by the military is as constitutional as would be any authorized action by the Interstate Commerce Commission within the limits of the constitutional power to regulate commerce.

Despite the identical framework, there were two important differences between the two cases. The year and a half that separated the two decisions meant not only that the period of wartime urgency and uncertainty had passed, but that there was considerably more evidence available that the detention *at the time* was an unjustified overreaction fueled by racist paranoia rather than any military necessity.⁶³⁴ Even the minimalist “good faith” test for the racial discrimination imposed a considerably higher bar with an additional 18 months of hindsight. For this reason, it was crucial that the majority emphasize the *temporary*, time-sensitive emergency conditions in which the exclusion order was made. The order must be judged in light of the time it was promulgated,

⁶³² Rostow, 506.

⁶³³ *Plessy*, 531, 550. Quoted in Gudridge.

⁶³⁴ Irons, *Justice at War*

not with “the calm perspective of hindsight.”⁶³⁵ In response to the Murphy’s dissenting argument showing that military leaders were driven by racial bias rather than military calculation, the majority insists that “time was short” and the determination was made in “the critical hour” when military authorities “feared an invasion of our West Coast and felt constrained to take proper security measures” without delay.⁶³⁶ Under attack from the dissenting justices, the majority places nearly the entire justificatory weight on the *temporal* aspect of the emergency doctrine. The reasonableness and “good faith” of the racial discrimination, doubtful in retrospect, can be established *exclusively* on the basis of recognizing the shortness of time and urgency of the situation.

The second important difference is that the earlier decision was able to dodge the exclusion order – and hence the inevitable question of the internment itself – by focusing narrowly on the less-drastic curfew order. In *Korematsu*, the issue of exclusion was unavoidable. This too posed a major problem for the majority’s reliance on the emergency doctrine. The majority’s strategy was to insist –to the outraged incredulity of the dissents – that the only issue under consideration was the exclusion order requiring Korematsu to leave the area, *not* the detention program itself. This distinction is strained to say the least, since complying with the exclusion order meant reporting to a detention center. While the majority conceded that detention and confinement were necessarily the *means* of exclusion, the incidental fact that exclusion implied detention was irrelevant to the decision. It is obvious why the Court clung so stubbornly to this distinction. If ruling on the exclusion order meant considering the detainment program as a whole, the majority’s “emergency” rational based would fall apart. The exclusion order itself could be confined to a single moment, in the midst of urgent circumstances and the shortness of

⁶³⁵ *Korematsu* (J. Murphy, dissent), 224.

⁶³⁶ *Ibid.*, 223

time. By 1943, the ongoing detention was a long-term policy that extended far beyond any “reasonable ground” in emergency conditions. In a viciously circular logic, the constitutionality of the exclusion order required temporary emergency conditions; the order could remain constitutional after the emergency had passed by distinguishing the moment of temporary emergency powers from the long-term, non-emergency machinery of detention established by the emergency powers.

Finally, in *Endo*, released on the same day as *Korematsu*, the detention itself could no longer be avoided. Unlike the other two cases, Endo, a citizen and California civil servant, had complied with the military orders and had filed a habeas corpus petition before being transferred to a Utah camp. Ruling in her favor, the Court held that once a determination has been made of a detained citizen’s loyalty, she is entitled to unconditional release.⁶³⁷ The grounds for the holding served to strengthen the revived emergency doctrine. The Court avoided the “underlying constitutional grounds” for the decision and upheld the executive order and March statute *as temporary emergency measures “against espionage and sabotage.”*⁶³⁸ Thus, “we may assume for the purposes of this case that initial detention in Relocation Centers was authorized,” but only on the basis of an authority *implied* in by the statute. In order to preserve “the greatest possible accommodation of the liberties of the citizen with this war measure, any such implied power must be narrowly confined to the precise purpose of the evacuation program,” namely, to respond to the immediate emergency condition at the outset of the war.⁶³⁹

⁶³⁷ Endo was one of the 61,000 Japanese Americans who, by July of 1944, were kept in detention by the War Relocation Authority even though their “loyalty” had already been confirmed and they had been cleared for release by camp administrators. Supposedly, the Authority dragged its feet out of concern that former detainees who returned to their ordinary lives would enflame the racial prejudices and hostility of the white population. Gudridge, 1947.

⁶³⁸ *Endo*, 300. My italics.

⁶³⁹ *Endo*, 302.

National security

So far we've seen, in two key cases from the Second World War, the convergence of New Deal realist jurisprudence – what I called the *Blaisdell* paradigm – and blurring of the boundary between the categories of crime and war. This trend accelerated in the US accession to global harmony and the atmosphere of atomic threat during the Cold War. Jules Lobel, in a helpful overview, has associated the post-WWII period with the culmination of what he considers the overcoming of the “liberal” minimalist model of emergency powers.⁶⁴⁰ Lobel characterizes this period as an overturning of “the assumption that non-emergency peacetime conditions were the normal state of affairs and that emergency was an exception...”⁶⁴¹ In other words, this period was marked by a profound and pervasive sense of crisis, a nearly permanent and ongoing condition of global threat. Underlying this shift from the exception to the more or less ordinary nature of external crisis is the shift to the discourse of national security. The term national security, virtually unused before the late 1940s, quickly became a hegemonic, both institutionally and as a field of knowledge, beginning with the National Security Act and the creation of the National Security Council, both in 1947. As Mark Neocleous points out, an important distinction introduced by the replacement of national *defense* with national *security* is the considerably more comprehensive and flexible implications of the latter, encompassing defense within a broader field of vision.⁶⁴² Indeed, what national security referred to was not a narrowly national perspective alone but one that coupled that perspective with a conception of a hegemonic global order that required continual management and cultivation. National security referred to a *prospective project* of order creation and maintenance as much as it did to threats of a more immediate and specific kind. Such a project radically shifts the character of emergencies

⁶⁴⁰ Lobel, “Emergency Powers and the Decline of Liberalism,” 1399.

⁶⁴¹ *Ibid.*, 1399-1400.

⁶⁴² Neocleous, *Critique of Security*, 77.

encountered therefore, from immanent threats to the state to an array of challenges that may be encountered in the project of international order maintenance. Such emergencies are endemic in such a conception since every potential or prospective threat to American global hegemony factors as a threat to national security. Thus, according to the most important document setting forth this new vision, the National Security Council (NSC) Paper 68, issued in 1950, the US is entering “an indefinite period of tension and danger,” calling for what Truman referred to as “a great change in our normal peacetime way of doing things.”⁶⁴³

Tracing this continual theme in US executive rhetoric from the post-WWII ear to the 1980s, Lobel notes that “ironically, the era of our greatest international power and security has coincided with a mentality of great fear for our own national survival.”⁶⁴⁴ In fact, this assessment aptly captures what I referred to as the “paradox of security” in Chapter Two – the dynamic in which security, conceived as a comprehensive social good, acquires the character of an infinite aspiration rather than a quantifiable possession. In this case, the more “security” is acquired, the more vividly felt the need for security becomes. In any case, this atmosphere of global hegemony and ongoing security crisis had the effect of decoupling the link between a state of peace and the condition of normalcy. Instead, not war but permanent ongoing intervention and quasi-intervention became synonymous with the condition of normalcy, leading to what scholars have referred to as a mode of warfare curiously similar to the pre-modern period, in which “private and public armies were not distinct, peace and war were not distinct legal regimes, and intermittent warfare was constant.”⁶⁴⁵

Conclusion

⁶⁴³ Cited in Lobel, “Emergency Powers and the Decline of Liberalism,” 1401.

⁶⁴⁴ Ibid., 1402.

⁶⁴⁵ Ibid., 1404.

Throughout this dissertation I have been exploring a single set of questions, applying them to a variety of different historical and political contexts. The questions are: how are exceptional emergencies distinguished from quotidian political events? What is the vision of political “normalcy” in relation to which a state of exception can be declared, and in light of which the legitimate ends of exceptional, emergency powers defined? How do the background conceptions that define an “emergency” also shape the political dynamics of emergency powers? As I argued in chapter one, these questions push beyond the two predominant approaches in the contemporary literature: the first was the “naïve realist” view that emergencies have a self-evident, objective character, so that identifying an event as an “emergency” is a straightforward matter of accurately perceiving some factual state of affairs. The second was the decisionist or “deconstructive” view, which argues that emergencies can never be identified or verified factually, but rather are constituted independently of any “facts,” for example by a valid legal procedure for declaring a state of emergency, or by a sovereign decision on the exception. Neither of these two approaches, however, can provide us with an adequate account of the *politics* of emergencies, that is, the sense in which the definition of what counts as an emergency can be a dynamic arena of persuasion, justification and conflict, not only over the temporary consequences of emergency powers, but over the identity and content of normalcy as well. Distinguishing between normalcy and a state of emergency is not just a matter of perception (as in the realist account) or decision (in the skeptical account); it is also, crucially, an act of interpretation and a process of political judgment, where the determination of an emergency is at the same time an evaluative claim about the identity of political normalcy. In other words, the definition of what counts as an emergency is simulations a way of defining what is the state of affairs that is being threatened, which also implies a judgment about the value of preserving a

state of affairs that would justify exceptional measures. Thus, while the realist approach obscures this political realm of interpretation and judgment by reducing the definition of to a self-evident determination of facts, the skeptical approach dissolves the concrete political content and stakes of the definition of emergencies by abstracting and isolating the subjective decision on the exception from the broader ideological or normative context that determines whether such a decision will be considered authoritative, or legitimate.

Thus, the historical and contextual approach adopted in these chapters is motivated by two basic theoretical claims of the dissertation: first, that the what counts as an emergency is neither a self-evident fact nor the product of an unconstrained decision, but is constructed through a set of background assumptions and political judgments about the identity and value of normality. Secondly, the different ways that emergencies are defined and understood play a decisive role in shaping the political outcomes of emergency powers, so that for example the same institutional framework of emergency powers may produce very different political outcomes as the underlying conception of an emergency shifts.

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